82-11

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS..... Appellant

v.

RICHARD C. ADAMS ..... Appellee

APPEAL FROM THE INDIANA COURT OF APPEALS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Indiana Tax Sale Statutes[1] specifically Ind. Code §6-1.1-24-3 and §6-1.1-24-4, are violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because those statutes only provide for notice by publication to a mortgagee of a pending tax sale.

Whether Ind. Code §6-1.1-25-6 is violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because no notice is given to a mortgagee prior to the expiration of the redemption period, which results in the State taking Appellant's property without notice or compensation.

Whether the Indiana Tax Sale Statutes are violative of Equal Protection of the Fourteenth Amendment of United States Constitution as applied because they provide for notice to "owners" by mail, and no similar requirement exists to notify mortgagees of record.

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[1]The Indiana Court of Appeals in this case referred to these statutes as the Tax Sale Statutes. See Appendix infra p. 17 fn 1.

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JURISDICTION AND OPINIONS BELOW

The opinion of the Indiana Court of Appeals, from which the Mennonite Board of Missions appeals appears in the Appendix hereto, pp. 17-29, infra, and is reported at Ind. App., 427 N.E.2d 686.

The judgment of the Indiana Court of Appeals, extinguishing Appellant's prior recorded mortgage and quieting title in favor of Appellee, was entered on October 29, 1981. Appellant filed a Petition for Rehearing before the Indiana Court of Appeals on November 18, 1981, which was denied on December 8, 1981. Appellant filed a Petition for Transfer to the Indiana Supreme Court on December 24, 1981, which was denied on April 13, 1982.

Appellant timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Indiana Supreme Court and Court of Appeals on May 25, 1982. This same notice was sent to the Attorney General of the State of Indiana who was not a party to this action, but who may have an interest pursuant to 28 U.S.C. §2403(b).

This Appeal is being docketed in this Court within ninety (90) days from the denial of transfer by the Indiana Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2); §2101(c); §2104.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment: (DUE PROCESS and EQUAL PROTECTION) §1:

> .....No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATUTES

The most germane statutory provisions applicable to this appeal and contained in the Indiana Tax Sale Statutes are cited below in pertinent part:

Ind. Code §6-1.1-24-3

> (a) When real property is eligible for sale under this chapter, the county auditor shall post a copy of the notice required by Section 5 of this chapter at a public place of posting in the county courthouse at least three (3) weeks before the date of sale. In addition, the county auditor shall publish the notice required in Section 2 of this chapter, including the statement required in Section 2.1 of this chapter, in the manner prescribed in I.C. §6-1.1-22-4(b) once each week for three (3) consecutive weeks before the sale....

Ind. Code §6-1.1-24-4

> (a) In addition to the notice required by Section 3 of this chapter, the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last address. The county auditor shall prepare the notice in the form prescribed by the State Board of Accounts, and he shall mail the notice at least twenty-one (21) days before the day of sale....

Ind. Code §6-1.1-25-6

> (a) The county auditor shall send a notice by certified mail to the former owner of real property not more than sixty (60) days nor less than thirty (30) days before a tax deed for the property is executed and delivered under this chapter. The county auditor shall prepare the notice on the form prescribed by the State Board of Accounts....

Ind. Code §6-1.1-25-4(d)

> (d) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except for the lien of the state for taxes and special assignments which accrue subsequent to the sale and which are not removed under subsection (c) of this section....

STATEMENT OF THE CASE

The Mennonite Board of Missions is a not for profit, charitable, eleemosynary, religious organization, with offices located for over fifty (50) years in Elkhart County, Indiana.

On February 7, 1973, Alfred M. Moore, (hereinafter Moore), executed a mortgage in favor of the Mennonite Board of Missions on property situated in Elkhart County, Indiana. On March 1, 1973, the mortgage was recorded in the Elkhart County Recorder's Office, and can be found at Mortgage Record 388, page 63, as provided under Indiana law.[2] Under the terms of the agreement, Moore was responsible for paying the property taxes. Moore made all of her monthly mortgage payments, but unknown to the Mennonite Board of Missions, she failed to pay the property taxes. As a result the property which was the subject of the mortgage was sold by the State to the Appellee, Richard C. Adams, (hereinafter Adams), at a tax sale on August 8, 1977.

Indiana law does not require the State to send personal notice to mortgagees prior to a tax sale, and the Mennonite Board of Missions did not receive any notice. Indiana law provides for only constructive notice of a tax sale to mortgagees by posting at the court house and publication in a newspaper.[3] Because of this statutory manner of notice, the Mennonite Board of Missions was unaware of

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[2] Ind. Code §32-1-2-16

[3] Ind. Code §6-1.1-24-3

this tax sale. Appellant concedes that Moore received notice by mail of the tax sale, but Moore never informed Appellant of the sale. Despite the tax sale, Moore continued to fully pay the mortgage each month. Appellant first learned that the property had been sold for taxes after the redemption period expired. Indiana law allows a mortgagee a two (2) year period from the time of a tax sale to pay the tax delinquency and retain his property interest, but does not contain any provisions to notify a mortgagee of the expiration of this redemption period.[4]

On November 1, 1979, Adams filed an action to quiet title to the property naming as defendants, the Appellant and Moore. Adams claimed that he owned the property in fee simple under Indiana law.[5] He sought to have the prior recorded mortgage of the Appellants declared null and void, and enjoin the Mennonite Board of Missions from asserting any claim against the title to the property.

Moore never responded to the complaint, and a default judgment was entered against her. She has no interest in this appeal, and is not a party to it.

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[4]Ind. Code §§6-1.1-25-1; 6-1.1-25-4; 6-1.1-25-6

[5]Indiana law provides that a tax deed grantee obtains his property free and clear of all prior liens and encumbrances. Ind. Code §6-1.1-25-4(d)

FEDERAL DUE PROCESS RAISED

The Appellant raised the United States Constitutional questions presented by this appeal before the trial court.

The trial court rejected the Mennonite Board of Missions' constitutional arguments, and granted summary judgment in favor of Adams. The trial court followed an Indiana decision, First Federal Savings & Loan v. Furnish,[6] in granting its summary judgment. The Furnish case held that notice by publication was sufficient notice to a mortgagee of a tax sale under Due Process.

Consistently through the exhaustion of the Indiana Appellate process, the Appellant has maintained that Furnish failed to properly apply the controlling precedent set by this Court in Mullane v. Central Hanover Bank & Trust Company.[7] The Indiana Court of Appeals in this case, adopted the reasoning and analysis in Furnish.

The Appellant also argued before the Indiana Courts that the Due Process Clause was violated because the Indiana Tax Sale Statutes provided no notice at all to a mortgagee before a tax deed is issued, resulting in the extinguishment of Appellant's property interest by the State without notice or any compensation.

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[6]Ind. App., 367 N.E. 2d 596, reproduced in the Appendix hereto pp. 29-43, infra.

[7](1950) 339 U.S. 306, 70 S.Ct. 65, 94 L.Ed. 2d 865

The Indiana Court of Appeals in this case held that as a matter of Due Process no notice was required to be given to the Mennonite Board of Missions after the tax sale and prior to the issuance of a tax deed relying upon Texaco[8], to support this proposition.

When the Mennonite Board of Missions petitioned the Indiana Supreme Court to review the decision by the Indiana Court of Appeals, Appellant submitted that the lower court erred in failing to apply the Mullane guidelines to mortgagees. Appellant further argued that the Indiana Court of Appeals' reliance on Texaco may have been misplaced because at that time this Court had the Texaco case under advisement. Appellant further submitted to the Indiana Supreme Court that the issues of pre-sale notice by publication and post-sale notice were not separate issues, and that the Texaco case was not singularly dispositive of the issues raised in this appeal. Finally Appellant argued that the Texaco case could be readily distinguished from this appeal. In Texaco, the Indiana statutes in question were self-executing while here the Tax Sale Statutes contemplate a series of affirmative acts by the State before they come into play.

The Indiana Supreme Court without an opinion denied transfer.

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[8]Short v. Texaco, (1980), Ind., 406 N.E. 2d 625 affirmed; 454 U.S.__, 102 S.Ct. 781

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this case are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution. This case presents this Court with one of its first opportunities to expound upon two cases[9] decided by this Court during this term. Each of those cases touched upon considerations of adequate notice under Due Process as previously enunciated by this Court in Mullane. Each of those cases was brought to the attention of the Indiana Supreme Court by Appellant, since both cases were under consideration by this Court while this case was still pending before Indiana's highest court.

This case involves an interpretation of adequate notice under Due Process in a tax sale situation. Appellant has asserted that the Mullane guidelines as applied to this case would render the Indiana Tax Sale Statutes unconstitutional.

Under Indiana law notice to a mortgagee a tax sale is accomplished by posting at the court house or publication in a newspaper. The Indiana Tax Sale Statutes provide for additional notice to an "owner" by certified mail. The Mennonite Board of Missions does not challenge the constitutionality of those statutes in regard to an "owner" of the property. All

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[9]Greene v. Lindsey, __U.S.__, 50 LW 4483, No. 81-341

Texaco v. Short, (1982), 454 U.S.__, 102 S.Ct. 781, appealed from Short v. Texaco, (1980), Ind., 406 N.E. 2d 625

that the Appellant contends is that a person with a significant property interest at stake, such as a mortgagee of record, should also receive at a minimum notice of a tax sale by mail. Notice by posting at the court house and publication in a newspaper is simply not reasonably calculated to inform an interested party of a tax sale, and is deficient notice based upon the guideline set out in Mullane and Greene.

Although both Texaco and Greene involved an interpretation of Mullane, the different facts and circumstances present in those cases could explain their seemingly dichotomous results. In Texaco this Court upheld Indiana's Mineral Lapse Act against a challenge by certain owners of mineral interests who claimed it violated Due Process because it contained no requirement to personally notify them that their property interests would automatically lapse after twenty years, unless certain actions were taken by them to protect their mineral rights. The majority of this Court stated that the Mineral Lapse Statute was a self executing statute of limitation. As a consequence, no form of personal notice to mineral owners was required by Due Process--other than the passage of the act itself.

That decision at first blush seemingly signalled a possible retreat from Mullane, until this Court's decision in Greene came down, but those two decisions still may cause some confusion for legal practioners unless this Court reconciles them. This case provides this Court with just that opportunity.

In Greene, this Court struck down the Kentucky Forcible Entry and Detainer Act holding that the posting of service of process by tacking it upon the door of a tenant's apartment was, under the facts and circumstances of that case, not reasonably calculated to apprise a tenant of an eviction action and hence was violative of Due Process. This Court citing Mullane suggested that service on a tenant by mail in such a situation was an inexpensive alternative manner of service, which would more likely result in the tenant receiving actual notice of the eviction proceedings.

This appeal falls within the purview of the Court's ruling in Greene. In fact, it is submitted that the defective notice in this case is even more egregious than the deficiency found in Greene. It is submitted that the Kentucky procedure of sending a sheriff to give personal notice to a tenant, and then posting notice on his apartment door if he is not home, is more reasonably calculated to apprise him of an eviction action than is the Indiana procedure in this case of giving only constructive notice to mortgagee of a tax sale by posting it at the courthouse and publishing it in a newspaper.

This case is not like the Texaco case. In Texaco the Indiana statutes were self executing while in this case the Indiana statutes in question require a series of affirmative acts by the State to trigger them. In the latter situation a mortgagee cannot be presumed to know, without receiving some actual notice, that a tax sale is pending or has occurred.

This case presents a significant and substantial question of constitutional law

relative to whether notice by publication constitutes adequate notice under federal Due Process to interested parties of a tax sale because every state in this country has in effect procedures for the sale of real property for delinquent taxes, similar in some respects to the statutes in effect in Indiana at the time this case arose.

The questions presented by this appeal are likely to recur as indicated by the numerous state courts of last resort which have already ruled upon the issue of whether notice of a tax sale by publication is adequate under Due Process. Those decisions are in conflict. The states of Arizona,[10] Florida,[11] Kansas,[12] Michigan,[13] Missouri[14] and New Jersey[15] have followed the controlling precedent set by this Court in Mullane, and have held

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[10] Laz v. Southwestern Land Company (1964), 97 Ariz. 69, 397 P. 2d 52

[11] Quay Development, Inc. v. Elegante Building Corporation (1981), Fla., 392 S. 2d 901

[12] Chapin v. Aylward (1970), 204 Kan. 448, 464 P. 2d 177

[13] Dow v. State (1976), 396 Mich., 192, 240 N.W. 2d 450

[14] Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens (1979), Mo., 585 S.W. 2d 486

[15] Township of Montville v. Block 69, Lot 10 (1977), 74 N.J. 1, 376 A. 2d 909

that notice by publication is insufficient as a matter of Due Process in a tax sale situation. The decisions in those states have held that Due Process requires notice reasonable calculated to inform an interested party that a tax sale would take place, and that at a minimum such notice must be by mail. Those decisions have found notice by publication insufficient as a matter of Due Process.

In fact the Arizona case decided the same constitutional issues raised in this appeal in favor of the Appellant extending the requirement that mortgagees with recorded interests be given notice of a tax sale at a minimum by mail, and the Michigan Supreme Court extended the Mullane guidelines to require notice of a tax sale to land contract vendees by mail.

However, California,[16] Oklahoma,[17] and Oregon[18] have approved notice by publication.

The question raised by the Mennonite Board of Missions in this case presents this Court with the opportunity to finally resolve the conflicts among the various states.

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[16] Chesney v. Gresham (1976), 64 Cal., App. 3d 120, cert denied 432 U.S. 907, 97 S.Ct. 2952, 53 L.Ed. 2d 1079

[17] Christie-Stewart, Inc. v. Paschall (1972) Okla., 502 P. 2d 1265; vacated (1973) 414 U.S. 100, 94 S.Ct. 313; upon remand (1974) Okla., 544 P. 2d 505

[18] Umatella County v. Porter (1973), Ore., 507 P. 2d 406

Another indication of how frequent the issues raised by this case appear is the fact that this Court has previously held unconstitutional a New York tax foreclosure scheme which merely provided for notice by publication of a tax sale to a known incompetent,[19] while on several other recent occasions, this Court has noted probable jurisdiction in tax sale cases involving similar questions of adequate notice under Due Process as raised here only to subsequently dismiss.[20] The reasons for dismissal in those cases are not present in this appeal providing this Court with the opportunity to squarely face the constitutional question of adequate notice under Due Process in tax sale situations.

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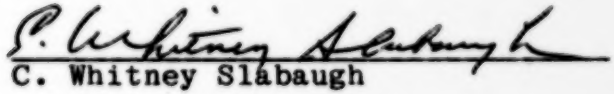
[19] Covey v. Town of Somers (1956) 351 U.S. 141.

[20] Paschall v. Christie-Stewart, Inc. (1973), 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed. 2d 298; (1973) 414 U.S. 1059; Botens v. Aronauer (1973), 414 U.S. 1059, 94 S.Ct. 562, 38 L.Ed. 2d 464; Pearson v. Dodd (1977), 429 U.S. 396, 97 S.Ct. 581, 50 L.Ed. 2d 574; Chesney v. Gresham, supra.

For these foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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STATE OF INDIANA)		IN THE ELKHART
	SS:	SUPERIOR COURT
COUNTY OF ELKHART)		1980 TERM
RICHARD C. ADAMS	)	CAUSE NO.
VS	)	50004
ALFRED JEAN M. MOORE AND	)	
MENNONITE BOARD OF MISSIONS)		

SUMMARY JUDGMENT

Cause coming on for hearing on motion for summary judgment filed by the plaintiff and the defendant.

Court having heard the evidence and arguments of counsel, and both counsel having informed the Court that there is, in fact, no dispute as to any material facts, Court now finds that there is no genuine issue as to any material facts and further finds that the law is with the plaintiff based on the case of First Savings & Loan Association of Central Indiana v. Furnish (1977), 367 N.E. 2d 596, and that the plaintiff is entitled to summary judgment granting the relief sought in the complaint as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff and against the defendant on the motion for summary judgment and the title to the real estate described in the complaint be quieted in

the title in the plaintiff and that the plaintiff shall own said real estate free and clear of any claim by the defendant.

Tax costs to the defendant. JUDGMENT.

(s) Donald W. Jones
Donald W. Jones, Judge
ELKHART SUPERIOR COURT

Dated this 26th day of February, 1980.

IN THE
COURT OF APPEALS OF INDIANA

MENNONITE BOARD OF MISSIONS, INC., Defendant-Appellant, v. RICHARD C. ADAMS, Plaintiff-Appellee.	))))))	No. 3-780 A 217

APPEAL FROM ELKHART SUPERIOR COURT
Honorable Donald W. Jones, Judge
50004

STATON, J.

The Mennonite Board of Missions, Inc. (MBM) appeals an adverse summary judgment quieting title to certain real property in Richard C. Adams. MBM urges the following issues for our review:

(1) Whether the pre-tax sale notice provisions under the tax sale statutes[1] meet constitutional due process standards;[2]

[1]"Tax sale statutes" are used to collectively refer to those statutes controlling the sale of real property for failure to pay taxes, Ind. Code §§6-1.1-24-1 to -12 (1976 & Supp. 1980); and, those statutes controlling either the redemption of or the quiet title action to that property, Ind. Code §§ 6-1.1-25-1 to -19 (1976 & Supp. 1980).

[2]MBM also challenges the correctness of the decision in First Federal Savings

(2) Whether notice of the right of redemption under the tax sale statutes is sufficient to meet constitutional due process standards; and,

(3) Whether the discrimination between owners of mortgagees in notification of the tax sale is violative of constitutional equal protection standards.

The trial court upheld the tax sale statutes against these constitutional challenges and we affirm that decision.

In 1973 Alfred Jean Moore executed a mortgage upon her real property in favor of MBM to secure an indebtedness of $14,000. Under the terms of the mortgage, Moore was obligated to pay the property taxes, but after 1974, she failed to pay them. The property was sold to Adams at a tax sale on August 8, 1977 for $1,167.75. On August 10, 1979, Adams received a tax deed to the property which he recorded on August 14, 1979. On August 16, 1979, MBM first learned of the above events when Moore informed MBM that "she was in trouble." Throughout the above period of time Moore had continued to make her mortgage payments, but still owed $8,237.19 on the indebtedness.

(Footnote continued from preceding page) and Loan Association of Central Indiana v. Furnish (1977), __Ind. App.__, 367 N.E.2d 596, which addressed this same issue; and whether, if correctly decided, Furnish controls the outcome in this case.

On November 1, 1979, Adams filed an action to quiet title naming MBM and Moore as defendants.[3] Moore failed to contest the action and Adams was granted a default judgment. On February 26, 1980, summary judgment was granted quieting title in Adams and all liens, including that of MBM's mortgage interest, against the property were extinguished.[4]

We note at the outset that MBM must meet a severe test in challenging the constitutionality of the tax sale statutes. The challenging party has the burden to present a strong and clear case establishing the unconstitutionality of the statutes. The court reviewing such challenge not only presumes the statutes are constitutional, but accords the statutes all reasonable presumptions supporting their validity. Short v. Texaco (1980) __Ind.__, 406 N.E.2d 625, appeal pending, 101 S.Ct. 1693; Johnson v. St. Vincent Hospital, Inc. (1980), __Ind.__, 404 N.E.2d 585. As recently stated by our Supreme Court in Short, supra:

> "Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing

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[3]MBM was a necessary party-defendant under IC 6-1.1-25-14.

[4]Under IC 6-1.1-25-4, the execution of the tax deed vests in the grantee a fee simple absolute estate free and clear of all liens. The quiet title action may be instituted to finalize that action, but the tax deed becomes absolute after one year. IC 6-1.1-25-17.

so in Noel v. Ewing, (1857) 9 Ind. 37, we said:

> 'It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the lawmaking power has either ignorantly or wilfully violated the constitution. To justify the Courts in declaring an act void, it must be clearly subversive of that instrument. (Citations omitted.)
>
> 'They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law.' 9 Ind. at 43.

"We reaffirm again now in this case our adherence to this vital principle." (parentheses original)

406 N.E. 2d at 627-28.

I.
Pre-tax Sale Notice

MBM first challenges the notice requirements under the tax sale statutes. Specifically, MBM alleges that the notice to mortgagees of the sale of property for delinquent taxes does not meet due process standards. This identical issue was addressed by the Second District of this Court in First Savings and Loan Association of Central Indiana v. Furnish (1977), __Ind.App.__, 367 N.E.2d 596.

The Furnish Court found the notice to mortgagees sufficient and upheld the constitutionality of the tax sale statutes. There has been no significant change in this area of the law since the Furnish decision. We are in agreement with the result reached therein and find no need to further examine that issue.

MBM attempts to distinguish the facts of the present case from those facts underlying the Furnish decision. The only significant factual distinction is that the mortgagee in the Furnish case had actual knowledge, unlike MBM in the present case, of the tax sale after the sale but during the redemption period. The Furnish Court specifically stated, however, that the issue addressed was "whether due process entitles a mortgagee to actual notice of a tax sale rather than constructive notice (publication)." (parentheses original) 367 N.E.2d at 599. Further, our examination of the Furnish decision reveals that the mortgagee's actual knowledge of the sale after the date of the sale was not determinative of the outcome of that issue. Notice after the date of

the tax sale, whether actual or constructive, was not relevant to the issue addressed. Therefore, MBM's attempt to distinguish Furnish upon the facts is without merit.[5]

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[5]MBM points out a further factual distinction between the Furnish case and the present case. In Furnish, the mortgagor became delinquent in the payment of the mortgage principal as well as in the payment of the real estate taxes. In the present case, the mortgagor was always current in her monthly mortgage payments. Assumedly, though not specifically argued, MBM is again asserting that the mortgagee in Furnish had actual knowledge of the tax sale. As stated above, notice after the sale is not pertinent to the issue presented in Furnish or in this case. Additionally, whether the mortgagee obtains knowledge of the tax sale by means other than notice given under the tax sale statutes is not pertinent to the issue presented. Again, the issue presented in Furnish and in this case is whether the tax sale statutes give sufficient notice. Whether the mortgagee obtains actual knowledge of the tax sale by means other than the operation of the statutes is not pertinent. The mortgagee in Furnish may well have obtained its actual knowledge of the tax sale when pursuing the reason for the delinquency of the mortgage payments. If so, such knowledge was obtained my means other than the operation of the tax sale statutes and is, therefore, not pertinent to the issue presented.

II.
Notice of Redemption Right

MBM makes a second challenge to the constitutionality of the notice provisions under the tax sale statutes. MBM alleges that the fact the statutes provide no notice to the mortgagee of the right of redemption[6] after the tax sale violates due process standards. However, MBM cites to no authority, and we find none, for the proposition that the State must provide notice to interested parties of their right of redemption.

We find the recent case of our Supreme Court, Short, supra, controlling. In Short, the Court addressed a constitutional challenge to the Mineral Lapse Act (MLA), Ind. Code §§ 32-5-11-1 to -8 (Supp.1980). The MLA terminates interests in mineral rights not "used"[7] for a twenty year period. The termination occurs without notice, other than the enactment of the MLA, to the owner of the interest. Upon enactment, the MLA granted mineral interest owners a two year period of grace to effect a qualifying "use" to preserve the interest. Addressing a challenge that

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[6]The tax sale statutes provide for the possible redemption of the tax sale property. IC 6-1.1-25-1 to -19. Any party with an "interest" in the property may redeem the property. Id. at -1. The mortgagee clearly falls within the category of interested parties with the right of redemption. Furnish, supra, 367 N.E.2d at 600.

[7]IC 32-5-11-3; Short, supra, 406 N.E. 2d at 627.

the MLA provided insufficient notice to interest owners under due process standards, Justice DeBruler wrote:

> "Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring . . . . Anderson National Bank v. Luckett, (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 . . . ."

406 N.E.2d at 629.

As in Short, all mortgagees have notice of the right of redemption by the enactment of the tax sale statutes and a grace period of two years granted by those statutes to protect their interests. Under the controlling precedent of Short, we find MBM's constitutional challenge to be insufficient.

III.
Equal Protection of Notice

And finally, MBM challenges the statutory scheme of classification regarding notice requirements under the tax sale statutes. MBM alleges the discrimination between owners and mortgagees is violative of the equal protection requirements of the United States and Indiana constitutions.[8]

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[8]Equal protection under these federal and state constitutions are coextensive.

In addressing an equal protection challenge:

> "If neither a fundamental right nor a suspect classification is involved, the standard of review is that the classification not be arbitrary or unreasonable. . .and that a 'fair and substantial' relationship exist between the classification and the purpose of the legislation creating it. . ."

Sidle v. Majors (1976), 264 Ind. 206, 210, 341 N.E.2d 763, 767. The classification scheme here under review does not involve either a fundamental right or a suspect class. See, Massachusetts Board of Retirement v. Murgia (1976), 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed. 2d 520.

Under the tax sale statutes, notice of the tax sale is posted and published. IC 6-1.1-24-3. Only owners of the real property upon which the delinquent taxes are owing receive notice by mail. IC 6-1.1-24-4. We find that statutory scheme to be reasonable and to have a fair and substantial relationship to the purpose of the legislation.

First, this classification may well evidence the Legislature's concern with the mortgagor-homeowner. The mortgage has traditionally been the financial vehicle upon which the ownership of a home has been pursued. And, traditionally, the law

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(Footnote continued from preceding page) Huff v. White Motor Corp. (7th Cir. 1979), 609 F.2d 286; Sidle v. Majors (1976), 264 Ind. 206, 341 N.E.2d 763.

has ensconced the rights of homeowners in the safety of significant procedural protections. See, e.g., Walker v. City of Hutchinson (1956), 352 U.S. 112, 77 S.Ct. 200; Fritz v. Board of Trustees of Town of Clermont (1969), 253 Ind. 202, 252 N.E.2d 567. This statutory scheme recognizes both the financial and protective traditions of this society.

Secondly, the obvious underlying purpose of the tax sale statutes is to insure the collection of delinquent taxes. In achieving that purpose, the Legislature has provided for notice to all interested parties by means of posting and publication. This is in addition to the common knowledge that real property taxes are due and owing upon an annual basis and that property may be sold if not paid. The classification scheme here challenged merely provides for a more certain form of notice to the real property owners. Those individuals, whether homeowners, as in the present case, or business owners as in the Furnish case, or any other type of owners, were deemed by the Legislature to be entitled to a greater form of notice than society as a whole. We cannot say that is an arbitrary or unreasonable classification. Neither can we say that the overall notice scheme of the tax sale statutes does not have a fair and substantial relationship to the purpose of collecting delinquent taxes.

And finally, there is a very real and substantial reason for the differing treatment of owners and mortgagees. As stated by the Court in Furnish:

> "It is understandable why actual notice has not been

> extended to mortgagees. Most mortgagees are in the business of lending money, and as professional money lenders prudence requires them to be aware of conditions involving their collateral. Normally, they can be expected to protect their interest by keeping records of the mortgagor's discharge of his obligations, such as payment of taxes, insurance, principal and interest installments."

367 N.E.2d at 601.[9]

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[9]Though MBM may not be a professional money lender, it freely chose to enter an area of sophisticated financial investment and thereby necessarily chose to incur the risk inherent therein. The State cannot reasonably be expected to assume the risk of its citizens' business ventures. MBM could have protected itself in one of at least three ways, in addition to the notice by the State. First a condition of the mortgage could have required a copy of the paid tax assessment be given to MBM within a given time after the taxes were due. Second, the mortgage could have provided that a portion of each payment be put in escrow and MBM then pay the tax assessment. Or third, MBM could have checked the public records to determine whether the tax assessment had been paid. We also note that after January 1, 1981, the mortgagee may be provided with notice by mail of any property subject to a tax sale by filing the appropriate form and paying a minimal fee. IC 6-1.1-24-4.2.

Finding no constitutional infirmity, we affirm the trial court.

HOFFMAN, P.J., and GARRARD, J., Concur.

FIRST SAVINGS AND LOAN ASSOCIATION
OF CENTRAL INDIANA,
Appellant (Plaintiff below),
v.
Alfred E. FURNISH and D. Louise Furnish,
Appellees (Defendants below).

No. 2-476A162.
Court of Appeals of Indiana,
Second District.

Sept. 19, 1977.

CASE SUMMARY

BUCHANAN, Judge.

Plaintiff-appellant First Savings & Loan Association of Central Indiana (First Savings), as a mortgage lienholder, appeals from the granting of Summary Judgment in favor of Appellees, Alfred E. and D. Louise Furnish (Furnish) quieting title in Furnish as tax sale purchaser, claiming the judgment was contrary to the evidence and pre-sale notice by publication was in violation of the Due Process Clauses of the United States and Indiana Constitutions.[1]

We affirm.

FACTS

The facts and evidence most favorable to the judgment of the trial court are:

On August 12, 1968, Donmar Realty Corporation (Donmar) executed a mortgage

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[1]U.S. Const. amend. XIV, § 1; Ind. Const. art. 1, §12.

on land it owned in Grant County, Indiana, in favor of Twin City State Bank (Twin City), which then recorded the mortgage in the Recorder's office of Grant County and subsequently assigned it to First Savings of Madison County, Indiana, on September 13, 1968. First Savings recorded the assignment in Grant County on October 2, 1968.[2]

Some time after the assignment, Donmar, the mortgagor, defaulted in its principal payments and also became delinquent in payment of real estate taxes. As a result the land, on August 14, 1972, was sold at a tax sale to Furnish after notice of the impending sale was sent to Donmar, the owner, by certified mail.[3] Notice was also posted on the Grant County Courthouse and, pursuant to statute,[4] published in a newspaper of local circulation in Grant

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[2]The mortgage assignment, part of a blanket assignment recorded in Mortgage Record 68, page 1616, reads in part:

ASSIGNMENT OF MORTGAGES

For value received, the undersigned Twin City State Bank, hereby sells, transfers, acts over and assigns to the First Savings and Loan Association of Madison County, its entire right, title, and interest in and to each and all of the following described bona fide mortgages. . ..

[3]Pursuant to IC 6-1-56-1 & 2.

[4]Id.

County for three consecutive weeks.[5] No notice was sent to First Savings.

The record indicates First Savings did not have actual knowledge of the real estate tax delinquency before the tax sale took place, but it is undisputed it had knowledge thereof during the period of redemption. In fact, on November 27, 1972, about three and one-half months after the sale, First Savings filed in the Grant Circuit Court an action to foreclose the mortgage naming Donmar (the original owner), Twin City (original mortgagee), and Furnish (tax sale buyer) as Defendants.

First Savings did not attempt to redeem the land pursuant to the right given lienholders by the statute then in effect,[6] and title was conveyed[7] to Furnish on August 16, 1974.

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[5]The record does not disclose the name of the newspaper in which the notice was published, the dates of publication, nor the wording of the publication.

[6]IC 6-1-57-1 allowed a lienholder to redeem by paying to the County Treasurer an amount as provided by IC 6-1-57-2; which read:

Amount required for redemption.--The amount required for redemption shall be as follows:
1. If redeemed after six (6) months and within one (1) year from the date of sale, the purchase price named in the certificate of sale together with ten percent (10%) of such amount in addition; or

After the action was venued to Miami County, Indiana, on March 9, 1973, and, following the subsequent failure by First Savings to redeem, Furnish filed, on December 24, 1974, a counter-claim against

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(Footnotes continued from preceding page)
2. If redeemed after six (6) months and within one (1) year from the date of sale, the purchase price named in the certificate of sale, together with fifteen percent (15%) of such amount in addition; or
3. If redeemed after one (1) year from date of sale, the purchase price named in the certificate of sale, together with twenty-five percent (25%) of such amount in addition.

In addition to the above, the amount required for redemption shall include all taxes and special assessments charged to the real property subsequent to those for which it was sold which have been paid by the purchaser, together with six percent (6%) interest on the taxes and special assessment. At any time after redemption, upon presentation and surrender of this certificate of sale to the County Auditor, said Auditor shall issue a warrant on the County Treasurer to pay the person surrendering the certificate the amount received by the Treasurer for redemption. The County Auditor shall endorse the certificate and preserve it as a public record. In case the certificate of sale is lost, the payment may be made to the proper person in the manner herein provided upon the County Auditor being fully satisfied by due proof of the existence of such certificate. (Acts 1963, ch. 280, § 702, p. 426.)

[7]IC 6-1-57-3.

First Savings to quiet title to the real estate. On October 8, 1975, First Savings filed a Consolidated Motion for Declaratory Judgment[8] against the counter-claim of Furnish. Furnish responded by an oral Motion for Summary Judgment[9] and the trial court granted Furnish's motion.

This appeal followed.

ISSUES

Two issues[10] are presented for our disposition:

(1) Does First Savings have standing to raise lack of due process (constructive notice only) under the 14th Amendment to the United States Constitution and art. 1, § 12 to the Indiana Constitution?

(2) Does failure to give a mortgagee actual notice of a tax sale constitute a denial of due process?

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[8]Ind. Rules Procedure, Trial Rule 57.

[9]TR 56. The trial court had, on July 3, 1975, entered Summary Judgment agaist Twin City for First Savings, holding that the assignment of the promissory note, and the mortgage securing it, to First Savings had been made with recourse.

[10]As First Savings appeals from a negative judgment, no error is presented by its assertion that the judgment was contrary to the evidence. Smitley v. Egley (1973), 156 Ind.App. 10, 294 N.E.2d 640; and cases cited herein.

PARTIES CONTENTIONS--First Savings argues it has standing to assert lack of due process becasue it has suffered harm, and further, that the landmark decision in Mullane v. Hanover Bank & Trust Co.[11] requires that a mortgagee whose lien is recorded must be given actual notice prior to the sale of the mortgaged land for tax delinquency.

Furnish responds that First Savings lacks standing to raise the constitutional issue as First Savings had actual knowledge of the sale within the redemption period and therefore was not harmed. Alternatively, Furnish argues that the statute pertaining to notice[12] is reasonably calculated to apprise any interested party of the pendency of the sale, thus satisfying the requirements of due process.

DECISION

ISSUE ONE

CONCLUSION--First Savings has standing to raise the constitutional question of lack of due process.

A threshold question is raised by Furnish's assertion that First Savings has no right to raise the constitutional question inasmuch as it was not harmed because the property could have been redeemed during the period of redemption.

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[11](1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

[12]Note 4 supra.

It is true that standing to raise a constitutional question is determined by the existence of harm which occurred because of the operation of the statute or act which is asserted as unconstitutional. Board of Commissioners of Howard County v. Kokomo City Plan Commission (1975), Ind., 330 N.E.2d 92; Lamb v. State (1975), Ind., 325 N.E.2d 180; State v. Clark (1966), 247 Ind. 490, 217 N.E.2d 588; Wells v. State (1976), Ind.App., 351 N.E.2d 43.

Harm is demonstrated, says First Savings, and we agree, because by redeeming after the sale a greater sum of money would have to be paid, consisting of penalties and interest.[13]

That such payments of penalties and interest constitute harm is consistent with the case law on this subject. Johnson v. United States, 422 F.Supp. 958 (N.D.Ind.1976); Cottongim v. Congleton (1964), 245 Ind. 387, 199 N.E.2d 96; Pennington v. Stewart (1937), 212 Ind. 553, 10 N.E.2d 619. And further, a determination of the constitutional question is necessary to a complete determination of the rights of the parties. Shigley v. Whitlock, supra; Garcia v. Slabaugh, supra; Saloom v. Holder, supra note 13.

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[13]See IC 6-1-57-2, supra note 6. Further, resolution of a constitutional issue requires a finding that reaching the constitutional question is absolutely necessary to a determination of the case. Shigley v. Whitlock (1974), Ind. App., 310 N.E.2d 93; Garcia v. Slabaugh (1974), Ind. App., 308 N.E.2d 714; Saloom v. Holder (1973), Ind.App., 304 N.E.2d 217.

ISSUE TWO

CONCLUSION--Due process does not require that a mortgage be given actual notice of a tax sale.

The precise question is whether due process entitles a mortgagee to actual notice if a tax sale rather than constructive notice (publication).

The trial court concluded, properly, that Indiana statutes relating to the sale of tax delinquent real estate contemplate a mortgagee only receiving constructive notice (posting and publication).

The general notice statute provides that notice be given by publication and posting without reference to whom it shall apply:

> To the list of real property described in §§ 601 [6-1-56-1] shall be attached a notice stating that each parcel of real property listed will be sold at public auction to the highest bidder; that said sales shall be an amount not less than the sum of delinquent special assessments and taxes (whether or not delinquent for more than fifteen months), taxes and special assessments due and payable in the year of the sale (whether or not delinquent), penalties s which may be due thereon, or due from the owner thereof with respect thereto, and five dollars [$5.00] costs; that said sale shall be conducted at a designated place in the courthouse or on the courthouse grounds; and that said sale shall be commenced at 10:00 A.M., on the second Monday in August next thereafter and

> continue from day to day until all the real property is sold.
> The County Auditor shall cause a copy of the aforesaid notice to be posted in a public place of posting in the courthouse at least three [3] weeks before the date of sale, and shall also give notice by publication once each week for three [3] consecutive weeks before such sale. The expense of such printing shall be paid out of the County general fund without prior appropriation therefor.
> The County Auditor shall, on or before the day of the sale, attach a copy of such notice to the list required by § 601 and certify on this record the manner and length of time the notice was printed and posted. [Acts 1963, ch. 280, § 602, p. 426.] (Emphasis supplied) (hereinafter referred to as the general notice statute). IC 6-1-56-2 [64-2256].

But significantly the very next section specifically requires actual notice be given by certified mail to the "owner or owners." No reference is made to any other interested person:

> 6-1-56-3 [64-2257]. Notice of sale to owner.--In addition to the notice required to be given by §§ 602 [6-1-56-2], the County Auditor shall send a notice of such sale to the owner or owners of such real property listed for sale for delinquent taxes or special assessments, at the last known address by certified mail at least 21 days prior to the date set for the sale. Such notice shall be in a form prescribed by the State Board of Accounts. The County Auditor shall, on

> or before the day of sale, certify on his record that such notice was mailed as herein provided. [Acts 1963, ch. 280, § 603, p. 426]. (Emphasis supplied) (hereinafter referred to as the special notice statute).

And then the statutory scheme of sale and redemption of tax delinquent real estate allows a lienholder, among other persons having an interest in real estate, the right to redeem:

> 6-1-57-1 [64-2276]. Redemption.--The owner, occupant, lienholder or any other person having any interest in real property sold pursuant to Article VI [6-1-56-1-6--6-1-56-14] of this act may redeem the property sold at any time before deed is issued therefor by paying to the county treasurer the amount required by this article [6-1-57-1--6-1-57-16] for redemption. [Acts 1963, ch. 280, § 701, p. 426]. (Emphasis supplied) (hereinafter referred to as the redemption statute.)

Giving the words of these three statutes their "plain or ordinary and usual sense" as we are required to do, the plain implication is that only an owner of real estate is entitled to the actual notice of the special notice statute. IC 1-1-4-1; State ex rel. Bynum v. LaPorte Superior Court No. One (1973), 259 Ind. 647, 291 N.E.2d 355; Sutto v. Board of Medical Registration & Examination (1962), 242 Ind. 556, 180 N.E.2d 533; State v. Bress (1976), Ind.App., 349 N.E.2d 229; Jenkins v. Stotts (1976), Ind.App., 348 N.E.2d 57; Sekerez v. Youngstown Sheet & Tube Co. (1975), Ind.App., 337 N.E.2d 521.

The mortgagee is not forgotten; he is given the right of redemption, indicating the legislature considered the mortgagee's interest sufficient to be entitled only to redemption rights.

Considering the general notice section and the special notice section in parimateria so as to give effect to each, New York Central R. Co. v. Public Service Comm. of Indiana (1957), 237 Ind. 544, 147 N.E.2d 547; Porter Memorial Hospital v. Harvey (1972), 151 Ind.App. 299, 279 N.E.2d 583, the obvious intent of the legislature is that only "owners" are entitled to actual notice. That a mortgagee is not an owner is well established by Indiana law.[14]

And so First Savings is confronted with a series of statutes which only provide for actual notice to "owners" and constructive notice to all others. But, says First Savings, failure to provide actual notice to a mortgagee of a tax sale is deprivation of property without due process.

Thus, having successfully leaped the hurdle of standing, the next hurdle, demonstration of lack of due process,

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[14]A mortgage is a lien, a mere security for a debt. The mortgagee has no title to the land mortgaged. Indiana Department of Revenue v. Colpaert Realty Corp. (1952), 231 Ind. 463, 109 N.E.2d 415. He is not an "owner" unless he is in possession of the mortgaged land and, as such, is not entitled to notice by personal service. Baldwin v. Moroney (1910), 173 Ind. 574, 91 N.E. 3.

remains in the constitutional obstacle course.

Every statute enacted by the Legislature of this state is clothed with the presumption of constitutionality. This presumption continues until the contrary is clearly shown. Sidle v. Majors (1976), Ind., 341 N.E.2d 763. To overcome this presumption the party attacking the statute must make the constitutional defects readily apparent. Hanley v. State (1955), 234 Ind. 326, 126 N.E.2d 879. In Indiana, the standard of persuasion applied is "beyond a reasonable doubt." Clark, supra: Vale v. Gary National Bank, 406 F.2d 39 (7th Cir. 1969).

First Savings leans hard on the landmark case of Mullane v. Hanover Bank & Trust Co.,[15] and particularly this language:

> As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. 339 U.S. at 318, 70 S.Ct. at 659.

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[15] Note 11 supra.

First Savings argues that "interested parties" does not distinguish between owners and non-owners in determining the type of notice given, i.e. "interested parties."

However, Mullane concerned itself with notice to owners and beneficiaries of the trust whose names and addresses were known.

Subsequent cases decided by the United States Supreme Court considering the adequacy of notice by publication in various types of situations have been restricted to owners of the affected property. See Schroeder v. City of New York (1962), 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255; Walker v. City of Hutchinson (1956), 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; Wisconsin Electric Power Co. v. City of Milwaukee (1956), 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241; Ridenhour v. County of Bay (1962), 366 Mich. 225, 114 N.W.2d 172; Meadowbrook Manor, Inc., v. City of St. Louis Park (1960), 258 Minn. 266, 104 N.W.2d 540.

After Mullane, Indiana, like other states, amended existing statutes to conform to this basic due process requirement. But the principal of actual notice has never been extended to any class other than "owners" in Indiana.

Fritz v. Board of Trustees of Town of Clermont (1969), 253 Ind. 202, 252 N.E.2d 567, is in keeping with this limitation. It held that property owners were entitled to actual notice before special assess-

ments could be effective. Admittedly, the court stated:

> We do say, however, that where personal notice is reasonably possible under the circumstances, the authorities are required to take steps which are reasonably calculated to give actual notice to these persons whose property is specifically affected in order to allow them to remonstrate and object within a reasonable period of time. 253 Ind. at 211, 252 N.E.2d at 571, 572. (Emphasis supplied)

That Fritz should not be interpreted so broadly as to include lienholders in addition to owners is this wording:

> When, however, the proceedings reach the point where it affects specific pieces of property owned by specific individuals the intentions of the public authority to seize or take an interest or make an assessment against such property should be made known to the individual affected by means which are reasonably calculated to give such person actual notice. 253 Ind. at 211, 252 N.E.2d at 571. (Emphasis supplied)

Reading the opinion as a whole we can discover no intent to include all interested persons within the actual notice requirement.

Our research discloses only one case extending Mullane to mortgagees. Laz v. Southwestern Land Co. (1964), 97 Ariz. 69, 397 P.2d 52. It is not persuasive, being founded largely on vague and general statements of public policy.

It is understandable why actual notice has not been extended to mortgagees. Most mortgagees are in the business of lending money, and as professional money lenders prudence requires them to be aware of conditions involving their collateral. Normally they can be expected to protect their interest by keeping records of the mortgagor's discharge of his obligations, such as payment of taxes, insurance, principal and interest installments.

Also, we are aware that there is a vintage Indiana case, Baldwin v. Moroney (1910), 173 Ind. 574, 91 N.E. 3, which specifically categorizes a mortgagee as a "non-owner" unless he is in possession of the real estate.

In sum, First Savings presents no applicable authority overcoming the presumption of constitutionality of the statutes in question, and thereby founders in the constitutional obstacle course.

Judgment affirmed.

WHITE and LYBROOK, JJ., concur.

IN THE
SUPREME COURT OF INDIANA
NO. 3-780A217

MENNONITE BOARD OF MISSIONS, Defendant-Appellant	)	APPEAL FROM THE ELKHART SUPERIOR COURT
vs.	)	
RICHARD C. ADAMS, Plaintiff-Appellee	)	The Honorable Donald W. Jones, Judge

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Mennonite Board of Missions, the Appellant above named, hereby appeals to the Supreme Court of the United States from the denial of Appellant's Petition for Transfer by the Indiana Supreme Court on April 13, 1982, which said denial of transfer affirms the decision by the Indiana Court of Appeals rendered on October 29, 1981.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

The Court of Appeals of Indiana ruled that the notice provisions of the Indiana Tax Sales Statutes were not violative of the Due Process Clause of the United States Constitution. Appellant has at all times claimed that the foregoing statutes are unconstitutional as violative of the notice required under Due Process, as applied by Appellant. The final judgment

from which this appeal is taken is in favor of the validity of said statutes.

May 25, 1982.

SLABAUGH, COSENTINO,
WALKER & SHEWMAKER

BY: (s)William J. Cohen

William J. Cohen
115 W. Lexington Ave.
P. O. Box 1866
Elkhart, IN 46515
(219) 295-6210

PROOF OF SERVICE

I, William J. Cohen, counsel for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of May, 1982, I served counsel for the Appellee, Robert W. Miller, 412 St. Joseph Valley Bank Building, Elkhart, Indiana 46516, and upon Linley E. Pearson, Attorney General for the State of Indiana, 219 State House, Indianapolis, Indiana 46204, by placing a copy of the foregoing Notice of Appeal in the United States mail, first-class postage prepaid.

(s)William J. Cohen
WILLIAM J. COHEN

VERIFIED PROOF OF SERVICE OF FILING
A PETITION FOR JURISDICTIONAL STATEMENT

I, WILLIAM J. COHEN, being first duly sworn upon my oath, allege and say:

1. That I am a member of the Bar of the United States Supreme Court.

2. That on the 25 day of June, 1982, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to the Clerk of this Court, forty (40) copies of Appellant's Petition for Jurisdictional Statement within the time allowed for filing.

3. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to Robert W. Miller, counsel for the Appellee, at his address, 412 St. Joseph Valley Bank Building, Elkhart, Indiana 46516, three (3) copies of Appellant's Petition for Jurisdictional Statement.

4. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and property addressed to Linley E. Pearson, Attorney General for the State of Indiana, at his address, 219 State House,

Indianapolis, Indiana 46204, three (3) copies of Appellant's Petition for Jurisdictional Statement.

William J. Cohen

William J. Cohen

STATE OF INDIANA)

) SS:

COUNTY OF ELKHART)

Subscribed and sworn to before me, this 28th day of June, 1982.

Suzanne E. Rupchock

Suzanne E. Rupchock, Notary Public
Residing in St. Joseph County, Indiana

My Commission Expires:
April 26, 1983

Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS
CLERK

No. 82-11

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS ..... Appellant

v.

RICHARD C. ADAMS ..... Appellee

APPEAL FROM THE INDIANA COURT OF APPEALS

JOINT APPENDIX

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APPEAL DOCKETED JULY 1, 1982
PROBABLE JURISDICTION NOTED OCTOBER 12, 1982

JOINT APPENDIX

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NOTATION CONCERNING PREVIOUSLY PRINTED PARTS OF THE RECORD

The following parts of the record of this case have been omitted in the printing of this Appendix because they appear in the Appendix (App.) attached to the Jurisdictional Statement (Jur. St.) filed with the Court on July 1, 1982:

Opinion of the Indiana Court of Appeals dated October 29, 1981....Jur. St. App. p. 17

Opinion of the Indiana Court of Appeals in the case of First Savings and Loan Association of Central Indiana v. Furnish dated September 19, 1977....Jur. St. App. p. 29

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 1, 1979--Complaint to quiet title filed.

Nov. 2, 1979--Sheriff of Elkhart County, Indiana, returns Summons served [on both Defendants].

Dec. 5, 1979--Answer and Affirmative Defense by the defendant, Mennonite Board of Missions.

Dec. 5, 1979--Plaintiff files motion for default judgment against the defendant Moore.

Dec. 5, 1979--The trial court grants default judgment against the defendant Alfred Jean M. Moore only.

Dec. 5, 1979--Plaintiff also files motion for summary judgment as to the defendant, Mennonite Board of Missions.

Jan. 2, 1980--Defendant, Mennonite Board of Missions, files affidavit in

opposition to motion for summary judgment.

Jan. 31, 1980--Defendant, Mennonite Board of Missions, files Motion for Summary Judgment.

Jan. 31, 1980--Hearing on Cross Motions for Summary Judgment. The trial court hears arguments and takes this cause under advisement.

Feb. 2, 1980--Defendant, Mennonite Board of Missions, tenders funds to the Court in the amount of $2,062.54.

Feb. 26, 1980--The trial court enters summary judgment for the plaintiff and against the defendant, Mennonite Board of Missions.

Apr. 21, 1980--Defendant, Mennonite Board of Missions, files motion and memorandum to correct errors.

May 1, 1980--Trial court denies the motion to correct errors.

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
ALFRED JEAN M. MOORE and MENNONITE BOARD OF MISSIONS,
Defendants

PLAINTIFF'S ACTION TO QUIET TITLE

Filed Nov. 1, 1979

COMES NOW the Plaintiff, Richard C. Adams, and for his Action to Acquire Title for Real Estate says as follows:

1. That the Plaintiff owns in fee simple and is entitled to possess real estate situate in the City of Elkhart, County of Elkhart, State of Indiana, and described as follows:

> Lot numbered 240 as the said Lot is known and designated on the recorded plat of Morehouse Second Addition to the City of Elkhart.

2. That pursuant to sale by public auction on August 8, 1977, the Plaintiff received a proper "Certificate of Sale" in

return for the purchase price he bid and paid on said real estate, said public auction being conducted by a governmental entity known as Elkhart County because of the failure of persons interested in the aforedescribed real estate to pay accruing real estate taxes thereon.

3. That on August 10, 1979, the Plaintiff presented the aforementioned "Certificate of Sale" to the Auditor of Elkhart County, Indiana, as by law provided and on said date the Auditor of Elkhart County executed and conveyed to the Plaintiff a proper tax deed as to the aforedescribed real estate.

4. That on August 14, 1979, said deed was recorded in Tax Deed Record 007, page 911, in the office of the Recorder of Elkhart County, State of Indiana; a copy of said deed is attached hereto as Exhibit A and made a part hereof.

5. That said Defendants, and each of them, claim or make claims from estate, right, title, lien or interest in or to said property adversed (sic) to the Plaintiff, including the claim of fee simple ownership to said property of Alfred Jean M. Moore and the claim of a real estate mortgage interest in favor of Mennonite Board of Missions arising out of a Real Estate Mortgage recorded in Volume 388, Page 693, Records, Elkhart County, Indiana, which mortgage originally called for the payment of Fourteen Thousand Dollars ($14,000.00) by Alfred Jean M. Moore to the Defendant Mennonite Board of Missions.

6. That pursuant to Indiana law, and the procedures established thereby for the sale of real property by local county governments for nonpayment of taxes, the tax deed aforementioned of the Plaintiff is superior to, and has priority over, any

estate, right, title, lien or interest in or to the aforedescribed real estate of the Defendant Alfred Jean M. Moore and the Defendant Mennonite Board of Missions.

7. That pursuant to Indiana Code Section 6-1.1-25-4 the tax deed of the Plaintiff granted to the Plaintiff in a (sic) state in fee simple absolute in the aforedescribed real estate, free and clear of all liens and encumbrances except the lien of the State of Indiana for taxes and special assessments with which have accrued subsequent to date of the original tax sale as to said real estate.

8. That this action is instituted pursuant to Indiana Code Section 6-1.1-25-14 et. seq. providing a specific cause of action to quiet title to real estate acquired by tax deed.

WHEREFORE, the Plaintiff prays:

1. That the Defendants and all persons claiming under them be required to

set forth the right and nature of their claims, if any, to said real estate.

2. That all adverse claims of the Defendants and all of the titled persons claiming under them in and to said real estate aforedescribed be determined by Decree of this Court.

3. That this Court adjudge and declare that the Plaintiff owns in fee simple absolute, and is entitled to the lawful, peaceful, and continuous possession of, the aforedescribed real estate, and that the Defendants, and all persons claiming under them, have no estate, right, title, lien or interest whatever in or to said real property, or any part thereof.

4. That this Court permanently enjoin the Defendants and all persons claiming under them from asserting any adverse claim to Plaintiff's title to said real estate.

5. That this Court declare that the real estate described herein is free and clear of any lien or encumbrance except the lien, if any, of the State of Indiana for taxes and special assessments which have accrued subsequent to the date of the original tax sale as to said real estate.

6. That the Plaintiff be granted such other and further relief as the Court may deem just and proper.

(s) Robert W. Miller

* * * * *

[IN THE ELKHART SUPERIOR COURT]

SUMMONS

Filed November 1, 1979
[Caption Omitted in Printing]

The State of Indiana to the Defendant

Mennonite Board of Missions

Address:

--any executive officer thereof
500 South Main Street
Elkhart, IN 46514

You have been sued by the person(s) named "plaintiff", in the court stated above.

The nature of the suit against you is stated in the complaint which is attached to this document. It also states the demand which the plaintiff has made and wants from you.

You must answer the complaint in writing, by you or your attorney, within twenty (20) days (23 days if service by certified mail) commencing the day after you receive this summons, or judgment will

be entered against you for what the plaintiff has demanded.

If you have a claim for relief against the plaintiff arising from the same transaction or occurrence, you must assert it in your written answer.

PRAECIPE

The following manner of service of summons is hereby designated: By personal service of the Sheriff of Elkhart County, Indiana.

Date November 1, 1979.

(s) Robert W. Miller
Attorney for Plaintiff

* * * * *

* * * * *

RETURN OF SUMMONS

This summons came to hand this 1st day of November, 1979, and I served the same, on the 1st day of November, 1979.

(1) by reading the same to and in the hearing of and by delivering copies of the

summons and complaint to Mennonite Board of Missions (LeRoy Yoder, Treas.)

* * * * *

And I now return this writ this 2nd day of November, 1979.

(s) Dick W. Bowman
Sheriff of Elkhart County, Indiana

By C-29 H. Helser
Deputy

* * * * *

[IN THE ELKHART SUPERIOR COURT]

ANSWER AND AFFIRMATIVE DEFENSE OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by Counsel and for the answer to the Complaint files (sic) in this cause, says the following:

1. That the Defendant, Mennonite Board of Missions, denies rhetorical paragraphs 1, 6 and 7 of the Complaint.

2. That the Defendant, Mennonite Board of Missions, lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in rhetorical paragraphs 2 and 3 of the Complaint and accordingly, denies them.

3. That the Defendant, Mennonite Board of Missions, has received Exhibit A attached to the Complaint, but has no knowledge as to the authenticity of Exhibit A or the legal import of Exhibit A, and accordingly, denies the allegations contained in rhetorical paragraph 4 of the Complaint.

4. That the defendant, Mennonite Board of Missions, admits that it is the mortgagee of a certain mortgage between the Mennonite Board of Missions and one Alfred Jean M. Moore, which said mortgage is duly recorded of record in the Mortgage Records, Volume 388, Page 693, in the Records of the Elkhart County Recorder's

Office, but the Defendant, Mennonite Board of Missions, denies the remaining portions of rhetorical paragraph 5.

5. That the Defendant, Mennonite Board of Missions, admits that Ind. Code §6-1.1-25-14 reads as follows, to-wit: (H.I.)

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to the interests of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest of the Defendant, Mennonite Board of Missions, concerning certain real estate situated in the County of Elkhart, which is the subject matter of this present litigation, and that the costs (sic)

be assessed against the Plaintiff, and for all other relief proper in the premises.

II.

AFFIRMATIVE DEFENSES

Comes now the Defendant, Mennonite Board of Missions, by counsel and for affirmative defenses alleges and says the following:

1. That to the extent that Ind. Code §6-1.1-25-4 which reads as follows, to-wit: (H.I.) can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the interest of Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and further, violates the fundamental notions of due process as set out in the United States Constitution

and/or the Indiana Constitution as provided in U.S. Const., Amend XIV, and Ind. Const. Art. 1, Section 12. Accordingly, any interest of the Plaintiff to the subject real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

2. That to the extent the applicable provisions of the Indiana law can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and further, violates the fundamental notions of due process as set out in the United States Constitution and/or the Indiana Constitution as provided in U.S. Const., Amend. XIV, and Ind. Const.,

Art. 1, Section 12. Accordingly, any interest of the Plaintiff to the subject real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

3. That the applicable provisions of Indiana law have not been followed, which would otherwise give the Plaintiff a fee simple absolute, and thus, the Plaintiff's interest, if any, to the property which is the subject matter of this present litigation is inferior to, secondary to, and subject to the recorded interest of the Defendant, Mennonite Board of Missions.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to the interests

of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest of the Defendant, Mennonite Board of Missions, concerning certain real estate situated in the County of Elkhart, which is the subject matter of this present litigation, and that the costs (sic) be assessed against the Plaintiff, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR DEFAULT JUDGMENT

Filed Dec. 5, 1979
[Caption Omitted in Printing]

COMES NOW the Plaintiff, by counsel, and moves the Court to enter a default judgment against the Defendant, Alfred Jean M. Moore, and in support thereof would show to the Court that summons and complaint was issued and served upon said Defendant on the first day of November, 1979, and that no responsive pleading or other action or appearance has been accomplished by said Defendant.

In support thereof the Plaintiff would rely on the attached Affidavit of the Plaintiff.

(s) Robert W. Miller

* * * * *

[IN THE ELKHART SUPERIOR COURT]

AFFIDAVIT OF ADAMS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

COMES NOW Richard C. Adams, Plaintiff in the above captioned cause, duly sworn under oath deposes and says:

1. That he is Plaintiff in the above captioned cause and he has read over the attached Action to Quiet Title To Real Estate which he caused to be filed through counsel in the Elkhart Superior Court, on November 1, 1979.

2. That the facts set forth in the attached Action filed are true and correct to the best of the knowledge and information and belief of your affidavit.

3. That your affiant has personally reviewed the records of the Elkhart County Recorder and the statutes set forth in said action and the same are as set forth in said complaint filed by your affidavit.

I affirm, under the pains of perjury that the foregoing representations are true.

(s) Richard C. Adams

[Copy of Complaint Attached to Affidavit Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
ALFRED JEAN M. MOORE and MENNONITE BOARD OF MISSIONS,
Defendants

DEFAULT DECREE

Filed Dec. 5, 1979

The Plaintiff, Richard C. Adams, having, by counsel, filed a Motion For Default Judgment against the Defendant, Alfred Jean M. Moore, and having filed a supporting Affidavit and an Affidavit of Non-Military Status and the Defendant, Alfred Jean M. Moore, having failed to

appear or otherwise comply with the Indiana Rules for Civil Procedure and having been served summons and complaint is now called and defaulted.

The Court being advised now enters judgment in favor of the Plaintiff, Richard C. Adams, and now enters judgment against the Defendant, Alfred Jean M. Moore, and now finds that Richard C. Adams, Plaintiff herein, is the owner of the following described real estate situated in Elkhart County, State of Indiana, free and clear of any claim of the Defendant, Alfred Jean M. Moore, said real estate being described as follows:

to-wit -

> Lot numbered 240 as the said Lot is known and designated on the recorded plat of Morehouse Second Addition to the City of Elkhart.

The Court now finds that the Plaintiff, Richard C. Adams, is the owner of the above described real estate in fee,

simple, absolute and the Court now does pursuant to Trial Rule 70(A) divest the Defendant, Alfred Jean M. Moore, of any interest she may have in the above described property and now vests title to said real estate in the Plaintiff, Richard C. Adams.

Judgment.

(s) Donald W. Jones
Donald W. Jones, Judge
Elkhart Superior Court

Dated this 5 day of December, 1979.

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR SUMMARY JUDGMENT BY ADAMS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

The Plaintiff, Richard C. Adams, pursuant to Trial Rule 56 of the Indiana Rules of Procedure, respectfully move (sic) the Court to enter a summary judgment in favor of the Plaintiff and against

the Defendant, Mennonite Board of Missions, on the grounds that there is no genuine issue as to any material facts herein and the Plaintiff is entitled to judgment as a matter of law.

This motion is based upon the complaint filed in this cause and the Affidavit of the Plaintiff, Richard C. Adams, filed in support of the Plaintiff's Motion for Default Judgment.

(s) Robert W. Miller

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

AFFIDAVIT OF DAVID C. LEATHERMAN

Filed Jan. 2, 1980
[Caption Omitted in Printing]

Comes now David C. Leatherman, and says the following:

1. That I am the Treasurer of the Defendant, Mennonite Board of Missions, a non-profit corporation;

2. That I have personally reviewed the books and records of the said corporation relative to a certain mortgage executed in favor of the Mennonite Board of Missions by Alfred Jean M. Moore, the mortgagor, and I find that the remaining balance due and owing from Alfred Jean M. Moore to the Mennonite Board of Missions is in the amount of Eight Thousand Two Hundred Thirty-Seven and 19/100 ($8,237.19) dollars, with interest at seven (7%) percent.

3. That the Defendant, Mennonite Board of Missions, had no knowledge whatsoever of a tax sale of the property which was the subject of a mortgage between The Mennonite Board of Missions and [Alfred] Jean M. Moore to the Plaintiff, Richard C. Adams.

4. That the Mennonite Board of Missions had no knowledge whatsoever that a tax deed for the property, which is the subject matter of this litigation, had been given to Richard C. Adams.

5. That the Mennonite Board of Missions has had no contact whatsoever from Richard C. Adams in regard to (sic) property, which is the subject matter of this litigation relative to a tax sale of any kind.

6. That the first knowledge that the Mennonite Board of Missions had that the property had been sold for taxes was on August 16, 1979, when Alfred Jean M. Moore

informed the Mennonite Board of Missions that she was in trouble.

7. That under the terms of the mortgage agreement between the Mennonite Board of Missions and Alfred Jean M. Moore, the mortgagor, Alfred Jean M. Moore, was responsible for paying the property taxes on the real estate, which is the subject matter of this present litigation.

8. That the Mennonite Board of Missions had no knowledge whatsoever that the property taxes on the property, which is the subject matter of this present litigation, had not been paid by Alfred Jean M. Moore until August 16, 1979.

9. That the Mennonite Board of Missions did pay the property taxes on the property, which is the subject matter of this present litigation, in June of 1974 and in November of 1974, but Alfred Jean M. Moore was to pay all subsequent property taxes due and owing.

I affirm, under the pains and penalties of perjury, that the foregoing representations are true.

(s) David C. Leatherman

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS

Filed Jan. 31, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel and respectfully moves the Court to enter Summary Judgment in its favor, for the relief requested in the Defendant's Answer and Affirmative Defense heretofore filed in this cause, and in support thereof, shows the Court the following:

1. That the pleadings, together with the affidavits on file in this case show

that there is no genuine issue as to any material fact, and that the Defendant, Mennonite Board of Missions, is entitled to a judgment as a matter of law.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff are inferior to, subject to, and secondary to the interests of the Defendant, Mennonite Board of Missions, relative to the prior recorded interests of the Defendant, Mennonite Board of Missions, concerning certain real property situated in the County of Elkhart, which is the subject matter of this present litigation, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MEMORANDUM OF THE DEFENDANT MENNONITE BOARD OF MISSIONS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Filed Jan. 31, 1980
[Caption Omitted in Printing]

RELEVANT FACTS

The facts in this case are not in dispute. On November 1, 1979, Richard C. Adams, herinafter referred to as Adams, filed an Action To Quiet Title To Real Estate against Alfred Jean M. Moore and Mennonite Board of Missions. Adams claims that he has fee simple to certain real estate situated in the City of Elkhart, State of Indiana, which said property is legally described as follows:

> Lot Numbered Two Hundred Forty (240) as the said lot is known and designated on the recorded plat of

Morehouse Second Addition to the City of Elkhart.

The basis for Adam's claim is that he received a tax deed on August 14, 1979, which said deed was duly recorded in Tax Deed Record 007, Page 911, in the Office of the Recorder of Elkhart County, and that Adams has pursuant to Indiana Code 6-1.1-25-4 (d), a statutory fee simple absolute to the above described property.

Apparently, Adams purchased the above described property at a tax sale on August 7, 1977, and the following day received a certificate of purchase of that property. Subsequently, on August 10, 1979, Adams presented the certificate of sale to the above mentioned property to the Auditor of Elkhart County and received a tax deed to the said property, and that on August 14, 1979, Adams recorded his tax deed.

Meanwhile, the Defendant, Mennonite Board of Missions, was unaware of any of

these activities by Adams relative to the said property. Quite the contrary, the Defendant, Mennonite Board of Missions, had no knowledge whatsoever of the tax sale of the said property; or that a tax deed had been given to Adams until after Adams had received it. In fact, the Mennonite Board of Missions has had no contact whatsoever from Richard C. Adams in regard to the said property until after August 16, 1979. The first knowledge that the Mennonite Board of Missions had that the said property had been sold for taxes was on August 16, 1979, when the Defendant, Alfred Jean M. Moore, informed the Mennonite Board of Missions that she was in trouble.

Prior to Adam's involvement, the Defendant, Alfred Jean M. Moore executed a mortgage in favor of the Defendant, Mennonite Board of Missions, on the said property, on February 7, 1973, which said

mortgage was duly recorded in the Elkhart County Recorder's Office on March 1, 1973, and is found at Mortgage Record 388, page 693. Under the terms of the agreement between the Mennonite Board of Missions and Alfred Jean M. Moore, the mortgagor was responsible for paying the property taxes on the said real estate. Although the Mennonite Board of Missions did pay the property taxes on the said property, in June of 1974 and in November of 1974, Alfred Jean M. Moore, was to pay all subsequent taxes due and owing. The Mennonite Board of Missions had no knowledge whatsoever that the property taxes on the said property had not in fact been paid by Alfred Jean M. Moore until August 16, 1979, since Alfred Jean M. Moore had been regularly making her monthly mortgage payments. At this time, she still owed the Defendant, Mennonite Board of Missions, Eight Thousand Two Hundred Thirty-seven

and 19/100 ($8,237.19) Dollars, with interest thereon at seven (7%) percent.

ISSUE

DOES THE TAX DEED OF THE PLAINTIFF ELIMINATE THE PRIOR RECORDED MORTGAGE OF THE DEFENDANT?

SUMMARY ARGUMENT

The Plaintiff maintains that the tax deed from the County Auditor had eliminated the lien of the Defendant, Mennonite Board of Missions, even though the lien was secured by a prior recorded mortgage. In support of this contention, the Plaintiff relies on Ind. Code 6-1.1-25-4 (d).

This position, however, fails to consider another Indiana Statute which deals with priorities between conflicting interests in real property. That statute, Ind. Code 32-1-2-16, provides that interests in real property which are first recorded have priority over subsequent interests in property, whether the latter are recorded

or unrecorded. Thus, to the extent that Ind. Code 6-1.1-25-4 (d) can be construed to give the Plaintiff a fee simple absolute to the said property, free and clear of the interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied, and further, violates the fundamental notions of due process as set out in the United States Constitution and/or the Indiana Constitution, Article I, Section 12, since the Mennonite Board of Missions never had any knowledge of the tax sale. Accordingly, any interests of the Plaintiff to the said real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

ARGUMENTS

TO EXTINGUISH THE PRIOR RECORDED MORTGAGE OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS, WITHOUT ADEQUATE NOTICE, VIOLATES DUE PROCESS.

The effect of an execution and delivery of a tax deed is spelled out in Ind. Code 6-1.1-25-4 which states in pertinent part that:

> A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except the liens of the state for taxes and special assessments which accrue subsequent to the sale and which are not removed under sub-section C of this section.

Seemingly, the above-quoted statutory law would indicate that the grantee of a tax deed takes his title free and clear of the lien of the Defendant. However, this position ignores one decisive factor which leads to a contrary result. The statutory structure for selling delinquent property for taxes in the State of Indiana is

unconstitutional as applied to the Mennonite Board of Missions for the reason that they were never given actual or adequate notice of the tax sale.

The statutory procedures for selling property for delinquent property taxes provides for notice to be given for such a sale once a week for three consecutive weeks in a newspaper of general circulation in the county where the sale takes place. In addition, it is provided that the legal owner of property being sold for delinquent taxes be given actual notice of the sale. See Ind. Code 6-1.1-24-3 and 4. Nowhere in the statutes which deal with the procedures for a tax sale is it provided that a lien holder should be given actual notice of a tax sale. Because of this lack of notice to a lien holder of a tax sale, his rights cannot be extinguished by such a sale despite the provision in Ind. Code 6-1.1-25-4 (d).

To enforce that statutory provision, without adequate notice to the lien holder, violates fundamental concepts of due process.

By way of analogy, there is a wealth of authority for the proposition that the Indiana statutes discussed herein violate due process in regard to the elimination of Mennonite Board of Mission's lien. The seminal case is Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). In that case a New York statute authorized a trustee to give notice by publicaton of impending judicial settlements of common trust fund accounts. Actual notice was not required. The United States Supreme Court held that notice by publication did not fulfill the requirements of fundamental due process in regard to the beneficiaries who held present interest in that fund. The high court held that to fully adjudicate legal rights a defendant must

be given, if at all possible, actual notice of any pending litigation in order that he may appear at any hearing on the matter and defend his rights. If actual notice was not possible, then the party defendants must be given notice "reasonably calculated to reach interested parties." The Court in Mullane, supra, held that notice by publication was insufficient notice and that the defendants at the least should have been served by mail since such a method was more apt to give interested parties actual notice of any pending litigation. The same hold true in this case.

In Walker vs. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956), the appellant's land was taken by condemnation by the City of Hutchinson, Kansas. Notice of this proceeding was given as provided by statute which only required publication in a newspaper of

general circulation. After the time for appealing the condemnation had expired, Walker commenced a proceeding alleging that since he had never been actually notified of the condemnation proceeding, there was insufficient notice to satisfy the Fourteenth Amendment due process clause. The Kansas Supreme Court rejected Walker's request to enjoin the City of Hutchinson from entering or trespassing on his property. The United States Supreme Court reversed, stating inter alia that:

> Measured by the principals stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process.... In Mullane we pointed out many of the infirmatives of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case, there seems to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the City and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

Id. 352 U.S. 114, 116; 77 S. Ct. 200, 202

A subsequent U. S. Supreme Court case, Schroeder v. City of New York, [1962] 371 U.S. 208, 83 S. Ct. 279, invalidated a New York statute which is strikingly similar to the Indiana statutes here in question. In that case, the City of New York wanted to acquire the right to divert water from a river that flowed through Schroeder's land. Despite the fact that Schroeder's name and address was (sic) readily ascertainable from public records the City made no attempt to serve her personally of its suit to divert water across her property. Instead, notice of the City's acquisition was published in several newspapers with limited circulation, and notices were posted on trees along the river on Schroeder's property. The U. S. Supreme Court held the New York statutory scheme unconstitutional. To the same effect, this

court should find the Indiana statutes unconstitutional as applied because the Mennonite Board of Missions was not give actual notice of the pending tax sales, or that the redemption period was running, even though they could have been contacted since their mortgage was a matter of record.

APPLICABLE INDIANA CASE LAW

A recent Indiana Court of Appeals case, First Savings and Loan Association of Central Indiana v. Furnish, (1977), Ind. App., 367 N.E. 2d 596 held that due process did not require that a mortgagee be given actual notice of a tax sale. In Furnish, supra, the Plaintiff/Appellant, First Savings and Loan Association, was an assignee of a mortgage of property owned in Grant County, Indiana. The mortgagor defaulted in its principal payments and also became delinquent in its real estate

tax. As a result, the land was sold at a tax sale to Furnish after notice of the impending sale was sent to the mortgagor by certified mail. Notice of the tax sale was also published in the newspaper of local circulation in Grant County for three consecutive weeks pursuant to statute. No actual notice was sent to First Savings and Loan Association, although the loan institution became aware of the sale during the redemption period.

It is important to note at this juncture certain important factual dissimilarities with the case at bar as compared to Furnish. First of all, in Furnish, the mortgagee had actual notice that its mortgage property was delinquent in taxes and had been sold at a tax sale before the statutory period to redeem that property had expired. In the present case at bar, the mortgagee, the Defendant, Mennonite Board of Missions, had no knowledge at all

that its mortgage property was delinquent in taxes, until after the period to redeem that property had expired. In addition, the mortgagor in the Furnish case had become delinquent in the payment of its mortgage. Yet, in the present case, Alfred Jean M. Moore had regularly made her mortgage payments to the Mennonite Board of Missions, albeit she was delinquent in her payment of real estate taxes, a fact which was unknown to the Mennonite Board of Missions until after the Plaintiff had obtained a tax deed.

Aside from these factual dissimilarities with the Furnish case, the reasoning in that case is subject to doubt. Professor Townsend, (Professor of Law, Indiana University School of Law, Indianapolis) lambasted the Furnish case, in a recent law review article.

> The decision thus attempts to resolve the unsettled question of whether the United States Supreme

> Court decision in Mullane v. Hanover Bank and Trust Company applies to tax lien sales. Under that decision, constructive notice by publication is inadequate when actual notice can be given to a party in judicial type proceedings affecting its property. Unfortunately, the Court of Appeals failed to consider the obvious fact that tax sales are generally known to be conducted in careless, haphazard manner which do not produce a fair price for the property. Lack of notice to interested parties more than likely is one of the reasons for low prices at tax sales. Hopefully, this decision will not end the search for due process of law. 12 Ind. L. R. 289, 294 (1979) (emphasis added)

In Furnish the court chose to apply principles of due process only to "owners of the affected property."

What the Court of Appeals does is miscontrue Mullane by narrowing the application of fundamental notions of due process.

The U. S. Supreme Court had already rejected the position that due process covers only "owners of the affected property." In Fuentes v. Shevin (1972) 407

U.S. 87, 92. S. Ct. 1983, the U. S. Supreme Court wherein said in pertinent part:

> The appellants who sign conditional sales contracts lack full legal title to the replevied goods. The Fourteenth Amendment's protection to "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest."
> Id. 92 S. CT. 1983, 1997

The result reached in the Furnish case is further subject to doubt because the same court which decided Furnish, in an earlier decision, chose not to narrow the Mullane case. In Anderson Federal Savings and Loan Association v. Guardianship of Davidson, (1977) Ind. App. , 364 N.E. 2d 781 the Court of Appeals properly held that due process covers "any significant property interest" and not just to "owners of the property". In Anderson Federal Savings and Loan, supra, the Court states

the general law of due process as follows:

> Thus the idea consistently emerges from the case law of this state that a third person whose rights or claimed rights are to be affected by an adjudication, must be accorded an opportunity to be heard before a deprivation may legally occur. Id. 364 N.E. 2d 781, 785 (emphasis added)

Another Indiana decision, Shula v. Shula (1956), 235 Ind. 210, 132 N.E. 2d 612, held as a matter of due process that a mortgagee must be made a party to a divorce (given notice) before a trial court could make an order relieving the wife from liability for a mortgage note she had jointly signed.

Applying the fundamental principles of due process as outlined above, it is readily apparent, that Furnish, supra, misapplied those basic constitutional concepts, and accordingly, this honorable court should reject that ruling, and hold

that due process does require the Mennonite Board of Missions be given actual notice rather than merely constructive notice of a tax sale; or at least actual notice during the redemption period before its recorded lien can be eliminated by law.

In the Furnish case, it cannot be over emphasized that the mortgagee therein had actual notice of a tax sale, and an opportunity to exercise its option to redeem pursuant to Indiana law, prior to a tax deed being given to Furnish. The Mennonite Board of Missions submits that the Plaintiff had a duty to inform it that he had purchased the property at a tax sale, and thereby giving the Mennonite Board of Missions an opportunity to redeem that property prior to the Plaintiff receiving his tax deed. It is interesting to note that no contact was made by the Plaintiff at all in regard to giving the

Mennonite Board of Missions knowledge of the tax sale. But after the Plaintff received his tax deed, he had no problem at all in checking the records, and seeking to eliminate the Defendant's, Mennonite Board of Missions', interest in the said property after it was too late for them to redeem that property.

It is a fundamental notion of due process that where the name and address of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of the pendency of an action which could eliminate those rights. The Plaintiff should have sent by letter to the Mennonite Board of Missions, notice that he had purchased the said property at a tax sale before the redemption period expired. At the very least, the County Auditor as a matter of due process, should have notified the Defendant, Mennonite

Board of Missions, that its property had been sold for taxes, and that the redemption period was running. Failure to give actual notice to the Defendant, Mennonite Board of Missions, that the property in which it had a valid prior recorded mortgage, had been sold for taxes, and that the Mennonite Board of Missions had a right to redeem that property, violates the fundamental notions of due process as set out in Mullane and other cases cited above.

Since no notice was given, and the statute provides for no actual notice, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and this honorable court should so find, and enter a judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to

the interest of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest.

Respectfully submitted,

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

TENDER OF FUNDS TO COURT BY MENNONITE BOARD OF MISSIONS

Filed Feb. 8, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel and tenders to the Court and Clerk the sum of Two Thousand Sixty-two Dollars and Fifty-four Cents ($2,062.54) which sum reflects the statutory amount (Ind. Code 6-1.1-25-2) required to be paid to the above named Plaintiff by a lienholder to redeem the

property which is the subject matter of the present litigation, and that the Court order the Clerk to hold said funds in trust, bearing interest, until the Court otherwise directs dispersal of said funds and in support thereof, shows the Court the following:

1. That the Plaintiff paid One Thousand One Hundred Sixty-seven Dollars and Seventy-five Cents ($1,167.75) to purchase the said property at a tax sale on August 8, 1977.

2. That on November 10, 1979, the Plaintiff paid Seven Hundred Thirty-four Dollars and Ninety Cents ($734.90) for the property taxes due and owing on the said property from August 8, 1977 to August 10, 1979.

3. That the amount of Two Thousand Sixty-two Dollars and Fifty-four Cents ($2,062.54) reflects the amount required

to redeem the said property under Ind. Code 6-1.1-25-2.

4. That in the event that the Court should grant the Defendant's Motion for Summary Judgment filed on January 31, 1980, in this cause, the amount tendered by the Defendant to the Court and Clerk should be paid to the Plaintiff, and the claim of the Plaintiff to the subject property should be extinguished pursuant to law.

WHEREFORE, the Defendant respectfully asks the Court to order the Clerk to place the funds tendered by the Defendant in an interest bearing trust account and to hold the same in trust until otherwise directed to disperse the same by the Court.

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
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STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

ORDER ACCEPTING TENDER OF FUNDS

Filed Feb. 8, 1980

The Court having reviewed the Motion for Tender of Funds of the Mennonite Board of Missions, and being duly advised now accepts the Tender of Funds by the said Defendant, and orders the Clerk to place said funds in an interest bearing trust account, and hold the same until otherwise ordered by the Court.

So ordered this 8th day of February, 1980.

(s) Donald W. Jones
Judge, Elkhart Superior Court

Certificate of Service
[Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART
SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

SUMMARY JUDGMENT

Filed Feb. 26, 1980

Cause coming on for hearing on motion for summary judgment filed by the plaintiff and the defendant.

Court having heard the evidence and arguments of counsel, and both counsel having informed the Court that there is, in fact, no dispute as to any material facts, Court now finds that there is no genuine issue as to any material facts and further finds that the law is with the plaintiff based on the case of First Savings & Loan Association of Central Indiana v. Furnish (1977), 367 N.E. 2d 596, and that the plaintiff is entitled

to summary judgment granting the relief sought in the complaint as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff and against the defendant on the motion for summary judgment and that the title to the real estate described in the complaint be quieted in the title in the plaintiff and that the plaintiff shall own said real estate free and clear of any claim by the defendant.

Tax costs to the defendant. JUDGMENT.

(s) Donald W. Jones
Donald W. Jones, Judge
ELKHART SUPERIOR COURT

Dated this 26th day of February, 1980.

[IN THE ELKHART SUPERIOR COURT]

DEFENDANT'S MOTION TO CORRECT ERRORS

Filed Apr. 21, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel, and respectfully moves the Court to correct its judgment entered on February 26, 1980, wherein the Court found "... that the law is with the Plaintiff based on the case of First Savings and Loan Association of Central Indiana v. Furnish (1977), 367 N.E. 2d 596, and the Court thereafter ordered, adjudged and decreed that "... the title to the real estate described in the complaint ... be quieted ... in the Plaintiff, and that the Plaintiff shall own said real estate free and clear of any claim by the Defendant", because the said judgment of the Court is contrary to law for the following reasons:

1. It violates due process and equal protection under the United States and Indiana constitutions.

2. The law is not with the Plaintiff based on the Furnish case.

3. That due process of law and of equal protection under the law requires that the Defendant, Mennonite Board of Missions, be given notice, reasonably calculated, under the circumstances, to apprise it that its property interest was being sold at a tax sale, and the Defendant, Mennonite Board of Missions, was not in fact given reasonable notice that its property was sold at a tax sale until after the period to redeem its property interest had expired.

4. That to the extent that Ind. Code 6-1.1-25-4 can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the

property interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional and violates the fundamental notions of due process and equal protection as set out in the United States Constitution and the Indiana Constitution.

5. That the applicable provisions of Indiana law relative to the sale of real property for delinquent taxes violate fundamental notions of due process and equal protection as set out in the United States Constitution and/or the Indiana Constitution, because they fail to provide adequate notice to record lienholders when their property interests are being sold at a tax sale.

6. That it is an unreasonable classification, which violates equal protection, that Indiana laws relative to the sale of real property at tax sales provide for notice to the owners of real property, and

not to record lienholders, and that there is no rational basis for this distinction.

7. That the Court of Appeals in Furnish, supra, misapplied the constitutional guidelines of due process and equal protection in their review of Indiana laws relative to tax sales of real property:

> (a) Since "state action" and a "property interest" is involved in tax sales, a higher degree of judicial scrutiny is required in reviewing the applicable Indiana Statutes to see if they pass constitutional muster, than was applied by the Furnish court.
>
> (b) That the Furnish court erroneously narrowed the concept of due process in regard to tax sales under Indiana law by holding that due process did not require personal notice to record lienholders.
>
> (c) That the Furnish court misreads the meaning of the term "owners" as it is found in Ind. Code 6-1.1-24-4 and other provisions in Indiana law relative to tax sales of real property.

8. That the facts of this case take it out of the reach and holding of the Furnish case, because in the case at bar,

(a) The lienholder, Mennonite Board of Missions, had no knowledge whatsoever that its property interest was sold for taxes until after the period to redeem it had expired, whereas:

(b) The lienholder in the Furnish case obtained knowledge that its property interest had been sold at a tax sale prior to the expiration of the redemption period, but deliberately chose not to redeem it.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court correct its judgment entered on February 26, 1980, and thereafter enter a judgment holding that the property interest of the Plaintiff is subject, inferior, and secondary to the property interest of the Defendant, Mennonite Board of Missions, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO CORRECT ERRORS

Filed Apr. 21, 1980
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

REQUEST TO WITHDRAW TENDER OF FUNDS

Filed Apr. 21, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel, and respectfully moves the Court to allow it to withdraw its tender of funds to the Court made on February 8, 1980, and in support thereof show the following:

1. That since this action is a proceeding in equity, to quiet title, and resolve the priority of the respective

property interests of the parties, the Defendant felt that to invoke equity, it must do equity, and accordingly, made its good faith tender offer to redeem its property interest pursuant to Ind. Code 6-1.1-25-2 as reasonably as possible to do so after obtaining knowledge of the Plaintiff's property interest.

2. That although the Defendant, Mennonite Board of Missions, maintains as a matter of law that the Plaintiff's property interest should be extinguished under the law in exchange for the Defendant, Mennonite Board of Missions', tender offer to redeem the said property, this would result in the Defendant, Mennonite Board of Missions, making a profit, and because the Defendant, Mennonite Board of Missions, is a non-profit, charitable, eleemosynary corporation, the Defendant, Mennonite Board of Missions renounces that remedy at this time.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court grant this request to withdraw the tender offer heretofore made by it and return the tendered funds to the Mennonite Board of Missions, together with interest at the legal rate, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART
SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

ORDER

Filed Apr. 21, 1980

The Court having reviewed the Motion for Request to Withdraw Tender of Funds of the Mennonite Board of Missions, which reads as follows: (H.I.), and being duly advised, now orders the Clerk to return the said funds together with interest at the legal rate.

So ordered this 21st day of April, 1980.

(s) Donald W. Jones
Judge, Elkhart Superior Court

CERTIFICATE OF SERVICE
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[IN THE ELKHART SUPERIOR COURT]

PRAECIPE

Filed May 1, 1980
[Caption Omitted in Printing]

TO THE CLERK OF THE ELKHART SUPERIOR COURT OF ELKHART COUNTY:

You are hereby requested to prepare and certify a complete transcript of the entire record of the above-entitled cause to be used on appeal to the Court of Appeals in Indiana.

The record, as above requested, should include the entire record in the above-entitled cause from the date the original complaint was filed, up to and including final judgment and the ruling on the Motion to Correct Errors. It shall include without limitation certified copies of all process, pleadings, motions and other written documents filed or offered to be filed during the proceedings. A

certified copy of the Motion to Correct Errors should be included at the beginning of the transcript.

Respectfully submitted,

* * * * *

(s) C. Whitney Slabaugh
(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

MORTGAGE

Vol. 388 Page 693
(Added by Elkhart County Recorder)

REAL ESTATE MORTGAGE

* * * * *

This Indenture Witnesseth, that ALFRED JEAN M. MOORE, a married adult lady as her sole property, 1829 Stevens Avenue, Elkhart, Indiana of Elkhart County, in the State of Indiana Mortgage and Warrant to MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio, the following described Real Estate in Elkhart County, in the State of Indiana, as follows, to-wit:

> Lot Numbered Two Hundred Forty (240) as the said lot is known and designated on the recorded plat of Morehous Second Addition to the City of Elkhart.
>
> Subject to 1973 taxes due in 1974.
>
> To secure the payment of Fourteen Thousand ($14,000.00) Dollars, evidenced by one (1) promissory note executed by mortgagor to mortgagee,

> payable in installments of One Hundred Fifty ($150.00) Dollars per month, including interest on the 7th day of each and every month beginning March 7, 1973 and all balance on or before twelve (12) years after date, said note bearing date of February 7, 1973, bearing interest at the rate of seven per cent (7%) per annum after date until paid, interest payable monthly, and all collection and attorney's fees,

and the mortgagor expressly agrees to pay the sum of money above secured, without relief from valuation or appraisment laws; and upon failure to pay any one of said notes, or any part thereof, at maturity, or the interest thereon, or any part thereof, when due, or the taxes or insurance as hereinafter stipulate, then all of said notes are to be due and collective, and this mortgage may be foreclosed accordingly. And it is further expressly agreed, that until all of said notes are paid, said mortgagor will keep all legal taxes and charges against said premises

paid as they become due, and will keep the buildings thereon insured for the benefit of the mortgagee, as its interest may appear and the policy duly assigned to the mortgagee, to the amount of Fourteen Thousand and no/100 Dollars, and failing to do so, said mortgagee, may pay said taxes or insurance, and the amount so paid, with 7 per cent interest thereon, shall be a part of the debt secured by this mortgage.

In Witness Whereof, the said mortgagor has hereunto set her hands and seal this 7th day of February, 1973

(Seal) (s) Alfred Jean M. Moore
Alfred Jean M. Moore

STATE OF INDIANA, Elkhart COUNTY, ss:

Before me, the undersigned, a Notary Public in and for said County, this 27th. day of February 1973, came Alfred Jean M. Moore, and acknowledged the execution of the foregoing instrument. Witness my hand and official seal.

My Commission expires October 1, 1975.

(s) Clifford P. Martin Notary Public
Clifford P. Martin

This instrument prepared by: Mennonite Board of Missions by Edna Carpenter

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Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-11

IN THE
SUPREME COURT OF THE UNITED STATES

1982 Term

MENNONITE BOARD OF MISSIONS,
Appellant,

v.

RICHARD C. ADAMS,
Appellee.

APPEAL FROM THE
INDIANA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

Robert W. Miller
Miller & Miller
412 St. Joseph Valley
Bank Building
Elkhart, IN 46516
Telephone: 219-293-2554

Attorney for Appellee

QUESTIONS PRESENTED

I. Does a statutory scheme that requires notice by publication to a mortgagee before a tax sale violate the due process clause of the fourteenth amendment?

II. Does a statutory scheme that does not require notice to a mortgagee before the end of a mortgage redemption period constitute taking without just compensation?

III. May a state constitutionally distinguish between notice given to an owner and notice given to a mortgagee in a tax sale statutory scheme without violating the equal protection clause of the fourteenth amendment?

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No. 82-11

IN THE
SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS,
Appellant,

v.

RICHARD C. ADAMS,
Appellee.

Appeal from the
Indiana Court of Appeals

MOTION TO DISMISS OR AFFIRM

The appellee in the present case moves this Court to dismiss the appeal of the appellant or, alternatively, to affirm the decision of the Court of Appeals of Indiana on the grounds that the questions presented by this appeal are not substantial enough to require plenary consideration and that the court below

correctly decided the constitutional issues presented by this case.

STATEMENT OF THE CASE

By letter dated August 11, 1982, Alexander L. Stevas, clerk of this Court, requested, on behalf of this Court, that the appellee file a response to the appellant's Jurisdictional Statement. This Motion to Dismiss or Affirm is in response to that request.

With that addition, for the purpose of this Motion to Dismiss or Affirm, the appellee, Richard C. Adams, will accept the Statement of the Case proposed by the appellant, Mennonite Board of Missions (hereinafter, the Board). See Jurisdictional Statement at 4-5. Adams is also in substantial accord with the Questions Presented that were proffered by the Board. See id. at i. This Court

should note, however, that although the Board challenged the Indiana tax sale statutes under the equal protection clause of the United States Constitution when formulating its Questions Presented, see id., it advanced no reasons why this Court should consider the statutes under such a challenge, see id. at 8-13. Nevertheless, Adams will briefly address the equal protection question.

No statutes or constitutional provisions other than those raised by the Board are necessary for the resolution of the questions raised by this appeal. Because these provisions are set out in the Jurisdictional Statement, id. at 2-3, they will not be repeated here.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THIS APPEAL ARE NOT SUBSTANTIAL ENOUGH TO REQUIRE PLENARY CONSIDERATION.

A. The Questions Raised By This Appeal Are Narrow.

The questions raised by this appeal are very narrow and affect only a small number of persons; they are not the broad questions urged by the Board in its Jurisdictional Statement. This case involves the narrow questions of what notice is due to a mortgagee of land in a tax foreclosure sale and whether a state may constitutionally distinguish between a mortgagee and an "owner" of land when establishing the boundaries of what notice is due. Most of the cases relied upon by the Board do not address this question. See Chesney v. Gresham, 64 Cal. App. 3d 120, 134 Cal. Rptr. 238 (1976), cert. denied, 432 U.S. 907 (1977); Quay

Development, Inc. v. Elegante Building Corp., 392 So. 2d 901 (Fla. 1981); Chapin v. Aylward, 204 Kan. 448, 464 P.2d 177 (1970); Dow v. Michigan, 396 Mich. 192, 240 N.W.2d 450 (1976); Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977); Umatilla County v. Porter, 12 Ore. App. 393, 507 P.2d 406 (1973). Indeed, the Court of Appeals of Indiana in its decision below relied heavily upon an earlier case, First Savings and Loan Association of Central Indiana v. Furnish, 174 Ind. App. 265, 367 N.E.2d 596 (1977) (reprinted in Jurisdictional Statement at 29-43) (hereinafter, Furnish), and the court in that case noted:

> Our research discloses only one case extending Mullane to mortgagees. Laz v. Southwestern Land Co. (1964), 97 Ariz. 69, 397 P.2d 52. It is not persuasive, being founded

> largely on vague and general statements of public policy.

367 N.E.2d at 601. More recent research by Adams indicated no additional cases, and the Board has not cited any other cases. Thus, any decision this Court would issue in the present case would not be as sweeping as the Board would wish.

In addition, the facts of the present case are unusual. The Board, as mortgagee, did not discover the mortgagor's default in property taxes until after not only the tax sale but also the two-year redemption period allowed by state law. Jurisdictional Statement at 4-5. Much more likely to occur is a situation more similar to that found in Furnish, supra. There, the court noted that a mortgagee who discovers a tax sale of the mortgaged property sometime before the expiration of the redemption period is protected by

his redemption rights. Id. at 600. The question presented by Furnish, not the question presented by the present appeal, is the more important question because it is reasonable to believe that a mortgagee usually would have actual notice from some source—the mortgagor either before or after the tax sale or activity on the land by the purchaser after the tax sale—than it is to believe that a typical mortgagee does not get actual notice of such a tax sale.

B. Precedent From This Court Is Not Conflicting.

The Board has attempted to show that a conflict exists between a leading case on the question of notice, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), and two more recent cases, Texaco, Inc. v. Short, ___ U.S. ___,

102 S. Ct. 781 (1982), and Greene v. Lindsey, ___ U.S. ___, 102 S. Ct. 1874 (1982), and has urged this Court to use the present appeal to resolve the alleged conflict. No such conflict exists, however. The three decisions factually are quite dissimilar from one another and from the present case. To the extent that Greene establishes a conflict with Mullane and Texaco, this conflict is resolved once it is realized that Greene was decided on a peculiar set of facts.

Mullane, supra, involved a challenge to a New York law that established notice provisions for an accounting of a common trust. No real estate was involved and the individual trusts that formed the common fund were described as "moderately sized," 339 U.S. at 307, thus indicating that the beneficiaries had little reason to keep apprised of their trusts'

activities. This Court determined that something other than notice by publication was due the beneficiaries, at least where they were easily ascertainable and, for the most part, lived out of the area in which the notice was published. Id. at 318. In doing so, this Court balanced the state's interest in final settlement of the trust against the individuals' due process interests, id. at 313-14, and noted that the case dealt with rights in intangible property. Id. at 316. Unlike a situation involving tangible property, the owner of which "usually arranges means to learn of any direct attack upon his possessory or proprietary rights," id., the beneficiaries of the trusts in Mullane were opposed by the very fiduciaries who were to take care of their interests. Id. Under these facts, this Court required notice other than by publication.

In Texaco, supra, this Court upheld the validity of an Indiana statutory scheme that caused mineral interests to lapse and become part of the interest of the land's surface owner if not used within a 20-year period. This Court determined that "no specific notice need be given of an impending lapse." 102 S. Ct. at 794.

Finally, in Greene, supra, this Court determined that mere posting of notice on an apartment door in a forcible detainer action is not sufficient notice where the process servers who posted the notice knew that the notices were often removed before they were seen by the intended tenants. A reading of this decision indicates that both the majority and minority believed the case to be governed by its peculiar facts. See 102 S. Ct. at 1879-80; id. at 1882-83 (O'Connor, J., dissenting). Greene apparently has little precedential

value even in forcible detainer actions; it in no way affects the questions raised by the present case. For these reasons, no conflict exists between Mullane, Texaco, and Greene that can be resolved by the present case.

C. The Present Appeal Is Not Appropriate For Resolution Of Issues Not Raised By The Facts.

The state legislatures in almost one-half of the states have adopted statutes that permit a tax sale of land to be held after no more notice is given to an actual owner of land than was given to the Board as mortgagee in the present case. See Note, "The Constitutionality of Notice by Publication in Tax Sale Proceedings," 84 Yale L.J. 1505, 1506 n. 4 (1975). These statutes have more often than not withstood constitutional challenges. Township of Montville, supra, 376 A.2d at 922-23

(Conford, P.J.A.D., dissenting). See, e.g., Botens v. Aronauer, 32 N.Y.2d 243, 344 N.Y.S.2d 892, appeal dismissed, 414 U.S. 1059 (1973); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), vacated because of independent state law grounds, 414 U.S. 100 (1973); Umatilla County, supra. Nevertheless, if this Court should decide to examine the constitutional questions raised by statutes such as Ind. Code § 6-1.1-24-3 (Repl. vol. 1978), it should do so in the context of a case that more forthrightly raises the pertinent questions. A determination of the question presented by the present appeal, that is, whether a mortgagee is entitled to notice other than by publication, will not resolve the broader question raised by the cases relied upon by the Board, that is, whether a landowner is entitled to such additional notice. Neither party can be

expected to brief this broader question if the case is set for plenary review. If the broader question must be resolved, this Court certainly would receive more guidance toward its resolution if the Court waited to hear from parties with more than an intellectual interest in the outcome. As noted previously, only one decision aside from the one on appeal and the opinion it relied on could be found that examined the due process rights of mortgagees. See Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964). The cases relied upon by the Board indicate that the question of adequate notice arises far more often in the context of an owner, and this is the question this Court should resolve if a resolution is necessary.

In addition, the present case is not one demanding for equitable reasons that this Court reach a different conclusion

than was reached below. The Board does not contest the fact that property taxes were not paid. Yet the state has a right to collect such taxes. The Board could have ensured that the taxes were paid in any number of ways, most simply by asking its mortgagor whether she had paid the taxes and, if she had not, then paying them itself.

The only other question raised by the Board is whether the state may distinguish between mortgagees and owners in giving notice without violating the equal protection clause. Compare Ind. Code § 6-1.1-24-3 with Ind. Code § 6-1.1-24-4 (Repl. vol. 1978). This question raises few constitutional problems and can be dispensed with quickly. Because neither a suspect class nor a fundamental right is involved in the classification, any reasonable justification advanced by the state should

be upheld. Western and Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The state readily could have concluded that the notification of mortgagees was not required by Ind. Code § 6-1.1-24-4 because mortgages often are not recorded or, because mortgagees are often large lending institutions, they are able to protect themselves from the effects of foreclosure by contract. See Furnish, supra, 367 N.E.2d at 601.

Within recent weeks two members of this Court have publicly criticized this Court's "exploding workload." "Lawyers' Ethics on Trial," Newsweek, Aug. 23, 1982, at 37, col. 3. The acceptance of this appeal for plenary consideration would increase that workload without resolving any major constitutional questions that

have not been adequately decided by lower courts and without resolving any essential conflicts in constitutional law.

II. THE COURT BELOW PROPERLY RESOLVED THE CONSTITUTIONAL QUESTIONS BEFORE IT.

The Court of Appeals of Indiana in its decision below properly noted the heavy burden placed on one challenging a statute because of the strong presumption of constitutionality that a statute carries with it. Jurisdictional Statement at 19. See also St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981); United States v. Vuitch, 402 U.S. 62 (1971). The Board was not able to overcome this burden with its due process and equal protection challenges in the court below, and that court properly concluded that the Indiana statutory scheme is constitutional.

The present appeal arises from a

rather peculiar fact situation. The mortgagor, who received a default judgment against her at trial court and is not a party to this appeal, was responsible under the mortgage to pay property taxes but did not do so. The Board, as mortgagee, apparently did not discover this situation until after not only the tax sale had occurred, but also after the period of redemption had run. Jurisdictional Statement at 4-5. The court below found that notice by publication was adequate both before and after the tax sale. Id. at 21-24.

Furnish, supra, relied upon by the court below, was decided within the context of a discussion showing that this Court's and other courts' extensions of the decision in Mullane, supra, had never been applied other than to actual owners of property. 367 N.E.2d at 601. Accord,

Township of Montville, supra, 376 A.2d at 923-24 (Conford, P.J.A.D., dissenting). Because of that, and because of the clear distinction in Indiana law between owners and mortgagees, the court in Furnish determined that notice by publication was adequate to inform the mortgagee of the pending tax sale. 367 N.E.2d at 601.

Other courts have clarified the distinction between the situation in Mullane and cases involving a landowner and a tax sale. In Mullane the beneficiaries had little reason to expect that the common trust fund account would be judicially settled. 339 U.S. at 316. In a case involving land taxes, the person owing the taxes knows that taxes are due on a certain day. Chesney, supra, 134 Cal. Rptr. at 243; Marlowe v. Kingdom Hall of Jehovah's Witnesses, 541 S.W.2d 121, 124 (Tenn. 1976).

The Board in the present case also can be assumed to know when taxes are due, yet it did not take any of the avenues open to it to discover whether the taxes had been paid. The Board could have examined public tax records or, more straightforwardly, asked its mortgagor whether she had paid the taxes. It did neither.

The dissent in Township of Montville, supra, a close 4-to-3 decision, noted another reason why notice other than by publication is not appropriate for a landowner in a tax foreclosure sale: New Jersey's experience with mailed notice had proven both administratively and commercially unfeasible. 376 A.2d at 921-22 (Conford, P.J.A.D., dissenting). The plan was administratively unfeasible because (1) the required notices and proofs of service could not be permanently maintained in tax assessors' offices and (2) those

offices could not be adapted to offices of public record. These factors led title insurance companies to conclude that it would be commercially impractical to insure titles based on foreclosures under that system. For these reasons, the New Jersey legislature repealed the requirement of mailed notice.

Such factors, particularly those pertaining to the physical impossibility of keeping records of notice, are certainly within the purview of state interests to be balanced. See Mullane, supra, 339 U.S. at 313-14. When weighed against the ease by which the Board could have discovered whether the taxes on its mortgaged property had been paid, they dictate the conclusion reached by the court below.

One final factor weighs in the state's favor in permitting notice by publication. The state has a right and a duty to

collect taxes and to do so in an efficient and practical manner. See Umatilla County, supra, 507 P.2d at 408. The method Indiana has chosen to adopt accomplishes this goal.

One final point should be made. One case relied upon by the Board, Collector of Revenue v. Parcels of Land Encumbered With Delinquent Tax Liens, 585 S.W.2d 486 (Mo. 1979), does not stand for the proposition that notice by mail is required instead of notice by publication in a tax lien foreclosure action. The statutory scheme required notice by mail and this was upheld against a challenge that notice by personal service was required. In just such a manner, this Court's affirmance of the decision below would in no way invalidate those statutory schemes that require some more certain notice. An ultimate reversal of the decision below, however, would require state legislatures

across the country to reexamine and re-enact many statutory requirements.

CONCLUSION

For the foregoing reasons, the appeal in the present case should be dismissed or the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 1982, I forwarded by first class mail, postage prepaid, three copies of the foregoing Motion to Dismiss or Affirm to each of the following:

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No. 82-11

Supreme Court, U.S.
FILED
DEC 27 1982
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS ..... Appellant

v.

RICHARD C. ADAMS ..... Appellee

APPEAL FROM THE INDIANA COURT OF APPEALS

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Whether the Indiana Tax Sale Statutes[1] specifically Ind. Code §6-1.1-24-3 and §6-1.1-24-4, are violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because those statutes only provide for notice by publication to a mortgagee of a pending tax sale.

Whether Ind. Code §6-1.1-25-6 is violative of the Due Process Clause of the Fourteenth Amendment of United States Constitution because no notice is given to a mortgagee prior to the expiration of the

---

[1]The Indiana Court of Appeals in this case referred to these statutes as the Tax Sale Statutes. See Jur.St.App. p. 17 fnl.

redemption period, which results in the State taking the Mennonite Board of Missions' property without notice or compensation.

Whether the Indiana Tax Sale Statutes are violative of Equal Protection of the Fourteenth Amendment of United States Constitution as applied because they provide for notice to "owners" by mail, and no similar requirement exists to notify mortgagees of record.

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JURISDICTION AND OPINIONS BELOW

The opinion of the Indiana Court of Appeals, from which the Mennonite Board of Missions appeals appears in the Appendix to the Jurisdictional Statement, thereto, pp. 17-29, and is reported at Ind. App., 427 N.E.2d 686 (1981).

The judgment of the Indiana Court of Appeals was entered on October 29, 1981. Appellant filed a Petition for Rehearing before the Indiana Court of Appeals on November 18, 1981, which was denied on December 8, 1981. Appellant filed a Petition for Transfer to the Indiana Supreme Court on December 24, 1981, which was denied on April 13, 1982.

The Mennonite Board of Missions timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Indiana Supreme Court and Court of Appeals on May 25, 1982. This same notice was

sent to the Attorney General of the State of Indiana who was not a party to this action, but who may have an interest pursuant to 28 U.S.C. §2403(b).

The Mennonite Board of Missions filed their Jurisdictional Statement with this Court on July 1, 1982. This Court noted probable jurisdiction on October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2); §2101(c); §2104.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT: (DUE PROCESS and EQUAL PROTECTION) §1:

.....No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATUTES

The most germane statutory provisions applicable to this appeal and contained in the Indiana Tax Sale Statutes are cited below in pertinent part:

IND. CODE §6-1.1-24-3

> (a) When real property is eligible for sale under this chapter, the county auditor shall post a copy of the notice required by Section 5 of this chapter at a public place of posting in the county courthouse at least three (3) weeks before the

date of sale. In addition, the county auditor shall publish the notice required in Section 2 of this chapter, including the statement required in Section 2.1 of this chapter, in the manner prescribed in I.C. §6-1.1-22-4(b) once each week for three (3) consecutive weeks before the sale....

IND. CODE §6-1.1-24-4

(a) In addition to the notice required by Section 3 of this chapter, the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last address. The county auditor shall prepare the notice in the form prescribed by the State Board of Accounts, and he shall mail the notice at least twenty-one (21) days before the day of sale....

IND. CODE §6-1.1-25-6

(a) The county auditor shall send a notice by certified mail to the former owner of real property not more than sixty (60) days nor less than thirty (30) days before a tax deed for the property is executed and delivered under this chapter. The county auditor shall prepare the notice on the form prescribed by the State Board of Accounts....

IND. CODE §6-1.1-25-4(d)

(d) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except for the lien of the state for taxes and special assignments which accrue subsequent to the sale and which are not removed under subsection (c) of this section....

STATEMENT OF THE CASE

This case presents the question of whether the Indiana tax sale statutes[1] in effect at the time this case arose are in

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[1]Ind. Code §§6-1.1-24-1 et. seq. and Ind. Code §§6-1.1-25-1 et. seq. Effective January 1, 1981, the statutory manner of giving notice to mortgagees was amended by Acts 1980, P.L. 45, p. 544. The 1980 amendment was not considered by the Indiana courts in deciding this case against the Mennonite Board of Missions. Consequently, it does not present an issue to be decided by this Court.

The 1980 amendment, Ind. Code §6-1.1-24-4.2 reads as follows:

> (a) In addition to the notice required by sections 3 and 4 of this chapter, the county auditor shall send a notice of sale to any mortgagee of real property which is subject to sale under the provisions of this chapter, if the mortgagee, annually, on a form prescribed by the state board of accounts, has:
>
> (1) requested that notice of a sale of the real property be sent to him; and
>
> (2) agreed to pay a fee to the county auditor, to cover the cost of sending notice.

violation of Due Process and Equal Protection under the Constitution of the United States.

This case originated when the Appellee, Richard C. Adams, hereinafter referred to as Adams, filed a complaint seeking to quiet title to some property commonly known as 1829 Stevens Avenue, Elkhart, Indiana (J.A. p. 3). In his complaint, Adams named as party Defendants, Alfred Jean M. Moore, hereinafter

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(Footnote continued from preceding page) The county council shall set the annual fee referred to in clause (2) of this section. However the fee may not exceed ten dollars ($10), for each separate parcel as carried on the tax records.

(b) The county auditor shall send the notice of sale to the mortgagee's last known address by certified mail. The county auditor shall prepare the notice in the form prescribed by the state board of accounts, and he shall mail the notice at least twenty-one (21) days before the date of sale. As added by Acts 1980, P.L.45, SEC.1.

referred to as Moore,[2] and the Mennonite Board of Missions, the Appellant herein.[3] Adams requested that the Elkhart County Sheriff deliver a copy of the summons and complaint to the Mennonite Board of Missions. A deputy sheriff hand delivered the complaint to the Mennonite Board of Missions at their principal offices located at 500 South Main Street, Elkhart, Indiana. (J.A. pp. 9-11).

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[2]The record of this case shows that Moore was not present when the Elkhart County Sheriff went to 1829 Stevens to deliver the summons and complaint. A deputy left a copy of the complaint there and also mailed a copy to Moore at her last known mailing address: 1829 Stevens Avenue. Moore never responded to the complaint. A default judgment was entered against her on December 5, 1979. (J.A. p. 20). She is not a party to this appeal.

[3]The Mennonite Board of Missions is an administrative branch of the Mennonite Church. It is a not-for-profit, charitable, eleemosynary, religious organization, with offices located for over fifty (50) years in Elkhart County, Indiana.

Adams alleged in his quiet title action that he now owned the Stevens property in fee simple under Indiana law free and clear of any interest asserted by Moore and the Mennonite Board of Missions. (J.A. p.6).

Prior to the tax sale Moore owned the fee simple title to the property in question. (J.A. p.5). She had purchased the Stevens property from the Mennonite Board of Missions and on February 7, 1973, Moore executed a mortgage in favor of the Mennonite Board of Missions on the Stevens property.[4] (J.A. pp.5, 67-70). Under the terms of the mortgage agreement, Moore was responsible for paying all of the property taxes. (J.A. p.68-69). However, unknown to the Mennonite Board of Mission

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[4]On March 1, 1973, the mortgage was recorded in the Elkhart County Recorder's Office, and can be found at Mortgage Record 388, Page 693.

she failed to pay the property taxes, and as a consequence, the Stevens property was sold by the Elkhart County Auditor to the Appellee, Adams, at a tax sale on August 8, 1977. (J.A. 3).

The Indiana procedures for selling real property for delinquent taxes provide that each county auditor shall prepare and record on or before June 1st of each year a list of real property on which one or more installments of property taxes have been delinquent for fifteen (15) months or more, or upon which a special assessment payment is due.[5]

Property upon which taxes are delinquent will be sold by the county treasurer on the second Monday of August, at public action to the highest bidder.[6]

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[5]Ind. Code §6-1.1-24-1

[6]Ind. Code §§6-1.1-24-1 and 6-1.1-24-5(e)

Indiana law requires that the county auditor send personal notice to owners by way of certified mail twenty-one (21) days prior to a tax sale.[7] The Mennonite Board of Missions does not challenge the way in which notice to owners is given under Indiana law. Nor does the Mennonite Board of Missions contend that the statutory manner of providing notice to Moore was not followed in this case.[8]

Unlike the notice provision utilized for owners, Indiana law, in effect at the time this case began did not require the county auditor to send personal notice to mortgagees prior to a tax sale. It provided for only constructive notice to

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[7] Ind. Code §6-1.1-24-4

[8] The public records of the Elkhart County Auditor's Office show that notice by certified mail was sent to Moore prior to this tax sale in August, 1977, and prior to the expiration of the redemption period in August of 1979; however, Moore never picked up either of those certified mailings.

mortgagees by posting at the courthouse and by publication in the newspaper.[9] Because of this statutory manner of notice to mortgagees, the Mennonite Board of Missions was unaware of the August 8, 1977 tax sale. (J.A. p. 25). Despite that tax sale, Moore continued to pay the mortgage to the Mennonite Board of Missions each month. (J.A. 25).

Indiana law allows an interested person a two (2) year period from the date of a tax sale to pay the tax delinquency and retain his property interest, if the property was sold to a private citizen, like Adams. But it does not contain any provisions to notify a mortgagee of the expiration of this redemption period.[10]

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[9] Ind. Code §6-1.1-24-3.

[10] Ind. Code §6-1.1-25-1. This redemption period is reduced to 90 days if purchased by someone acting under a state qualified urban homesteading program or one year if purchased by the county.

Under Indiana law if an interested person fails to pay the delinquent taxes prior to the expiration of the redemption period, the tax sale purchaser receives a tax deed from the state giving him a fee simple title free and clear of all prior recorded liens and encumbrances except those of the state.[11]

The Mennonite Board of Missions first learned that the Stevens property had been sold for taxes after the redemption period expired, when Moore informed them that she was in trouble. (J.A. 25). In his quiet title action, Adams sought to have the prior recorded mortgage of the Mennonite Board of Missions declared null and void, and to enjoin them from asserting any claim against the title to the Stevens property. (J.A. pp. 4-7).

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[11] Ind. Code §6-1.1-25-4.

The Mennonite Board of Missions challenged the constitutionality of the Indiana tax sale statutes in their answer and affirmative defense. (J.A. p.11, 14, 15). Subsequently, the Appellee filed a motion for summary judgment against the Mennonite Board of Missions. (J.A. p.22). Adams claimed that there were no genuine issues of material fact in dispute and that he was entitled to a judgment in his favor as a matter of law, relying upon an Indiana case, First Federal Savings and Loan Association of Central Indiana v. Furnish[12]

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[12] Ind. App.__, 367 N.E.2d 596 (1977) In that case, the mortgagor defaulted in its principal payments to the mortgagee, First Federal Savings & Loan Association of Central Indiana (First Federal), and also became delinquent in its payment of taxes. As a consequence, the property was sold by the State at a public sale. Notice to First Savings was only by posting and publication. First Savings had no actual notice of this sale. The property in question was purchased by Furnish at the tax sale. Before the expiration of the redemption period First Savings foreclosed on the property, and named Furnish as a defendant. First Savings, however,

which held that the Indiana tax sale statutes, then in effect, did not violate Due Process. In response, the Appellant filed a cross motion for summary judgment, agreeing that there were no disputed questions of fact, but taking the legal position that the Indiana tax sale statutes were unconstitutional because they only provide for notice by posting and publication to a mortgagee of record, prior to a tax sale which is insufficient notice, as established by this Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (J.A. pp. 27, 37).

(Footnote continued from preceding page) never exercised its statutory right to redeem the property prior to the expiration of the redemption period. The trial court held that Furnish owned the property in fee simple under Indiana law, and on appeal the Indiana Court of Appeals rejected First Savings' Due Process assertion that the tax sale was invalid because insufficient notice was given it of the tax sale. This case is set out in full in the Jur. St. App. pp. 29-43.

As previously noted, Indiana law gives a mortgagee the statutory right to redeem his interest by paying the tax delinquency prior to the expiration of the redemption period. Exercising that right, the Mennonite Board of Missions tendered the statutory amount[13] to redeem the property had they received actual notice of the tax sale. (J.A. pp. 50-52).

The trial court followed the Furnish decision and granted judgment in favor of the Appellee, thereby extinguishing the property interest of the Mennonite Board of Missions. (J.A. p. 54).

Subsequent to the decision by the trial court and during the pendency of this appeal, the Indiana General Assembly amended the Indiana tax sale statutes to provide for additional notice to mortgagees. That statute, Ind. Code

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[13] Ind. Code §6-1.1-25-2.

§6-1.1-24-4.2, as added by the 1980 Second Regular Session of the 101st Indiana General Assembly, Acts 1980 P.L. 45, p. 544 took effect on January 1, 1981.

The Indiana Court of Appeals did not consider the effect, of the 1980 Amendment to this controversy.[14] Therefore, this Court likewise need not consider the direct impact, of the 1980 Amendment in deciding the questions presented herein by the Mennonite Board of Missions.

Appellant argued before the Indiana Court of Appeals that the Indiana tax sale statutes then in effect violated Due Process as set forth by this Court in Mullane v. Central Hanover Bank & Trust Company 339 U.S. 306 because the only notice to mortgagees is by posting at the courthouse and publication in a newspaper, and because no notice at all is given to

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[14] Jur. St. App. p. 27 fn[9]

mortgagees before a tax deed is issued which results in the state taking the Mennonite Board of Missions' property without any compensation.

And the Mennonite Board of Missions further argued that those statutes violated Equal Protection because they provide for mailing notice to "Owners" of the real property both before a tax sale is held, and prior to a tax purchaser being issued a tax deed while no similar provision exists to mail notice to mortgagees in either situation.

On October 29, 1981 the Indiana Court of Appeals affirmed the decision of the trial court, rejecting Appellant's DUE PROCESS and EQUAL PROTECTION claims. The Indiana Court of Appeals concluded that Mullane was inapplicable to this case.

SUMMARY OF ARGUMENTS

NOTICE OF A TAX SALE BY POSTING AND PUBLICATION VIOLATES DUE PROCESS

The Indiana tax sale statutes in effect at the time this case arose violate Due Process because they do not provide for adequate notice reasonably calculated to inform mortgagees of record that a tax sale is about to take place. The Indiana procedures only provide for constructive notice to mortgagees by posting at the courthouse and publication in a newspaper. This Court has recognized that such notice, is generally an unreliable means of informing interested parties that a proceeding, which may affect their interests, is at hand. Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962). Posting and publication may be appropriate notice when the names and the whereabouts of interested parties are not

known, despite a diligent search, but when, as here, the Mennonite Board of Missions' mortgage was a matter of public record, giving the Mennonite Board of Missions notice of a tax sale only by posting and publication violates DUE PROCESS. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)

THE INDIANA COURT OF APPEALS ERRED IN NOT FOLLOWING THE CONTROLLING PRECEDENT OF THIS COURT

The Indiana Courts erroneously chose not to apply the reasoning of this Court in Mullane. In Mullane, this Court addressed the issue of whether notice by publication to beneficiaries of a common trust fund was adequate under DUE PROCESS.

The Mullane Court held that with respect to beneficiaries whose names and addresses were known to the trustee notice by publication was inadequate. Under those circumstances, Due Process required

at a minimum notice by mail since that manner of service was more likely to result in the beneficiaries receiving actual notice.

The mortgagee interest of the Mennonite Board of Missions is entitled to no less Due Process protection than were the property interests of the known beneficiaries in Mullane. It thus follows that in this case, as a matter of Due Process, the Elkhart County auditor had to mail notice to the Mennonite Board of Missions, of a tax sale.

This Court has subsequently applied the Mullane guidelines to strike down other state statutes which also had only provided for constructive notice to interested parties by either posting and publication or both. In Schroeder v. City of New York, 371 U.S. 208 (1962), the City of New York sought to divert some water from the Neversink River which resulted in the

taking of a portion of the appellant owner's land. Pursuant to the New York City Water Supply Act, the city had published notice of its acquisition of the right to divert water in several newspapers, and in addition posted notice on trees and poles in the general vicinity where the water was to be diverted, although no notices were posted on the owner's land. This Court therein held that newspaper publications and posted notices did not measure up to the quality of notice required under Due Process, since the name and address of the riparian owner was easily ascertainable from public records. Id. 211-213. In Walker v. City of Hutchinson, 352 U.S. 112 (1962), the City of Hutchinson decided to condemn a portion of Walker's property in order to widen a city street. The city only sent notice of the condemnation to Walker by publication. This Court, noting that it

is common knowledge that newspaper publications rarely inform an owner of proceedings against his property, set aside the condemnation proceedings as a violation of Due Process. Id. 116-117. In Walker, the owner's name and address was known to the city. This Court indicated under those circumstances Due Process required that the owner be notified by mail.

More recently in Greene v. Lindsey, __U.S.__, 102 S.Ct. 1874 (1982), this Court applying Mullane invalidated the Kentucky Forcible Entry & Detainer Act. Greene raised the issue of whether posting notice of an eviction action on a tenant's door was sufficient under Due Process. Posting was done only after personal service could not be obtained. This Court held that such substitute service was inadequate, and concluded that additional service by mail was an expeditious, inexpensive, required alternate manner of

service which would be more likely to apprise the tenant of the eviction action.

The decision by the Indiana Court of Appeals in this case cannot be affirmed by this Court without substantially cutting back on the principles established by this Court in Mullane, Schroeder, Walker, and Greene.

THE PROCEDURES CHOSEN BY INDIANA TO NOTIFY MORTGAGEES OF A TAX SALE CANNOT BE JUSTIFIED

Applying the criterion established by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976), it is apparent that Due Process requires that Indiana send notice to all interested parties by mail. In Mathews, this Court clarified the analysis relative to when a particular statute measures up to minimum standards of Due Process.

In this case the private interest which is affected by state action is the permanent loss of the Mennonite Board of Missions' mortgage without ever having received actual notice of a tax sale. This taking without notice or compensation is unconstitutional. Cf. Loretto v. Teleprompter Manhattan CATV Corp., __U.S.__, 102 S.Ct. 3164 (1982).

A recent Indiana case, St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981), demonstrates how mailing notice to mortgagees actually safeguards against the State erroneously selling property for delinquent taxes. In the St. Joseph County case, the owner had paid the real estate taxes, but the auditor erroneously sold the property at a tax sale anyway. After the sale, the auditor, although not required by Indiana law, sent notice of the tax sale to the mortgagee. The mortgagee promptly paid the taxes, and

proceeded to investigate why they were not paid earlier, and in the course of the investigation learned that the auditor had made a mistake.

The only interests of the State in selling property for delinquent taxes is simply to collect the delinquency. The interests of the State in not providing for better notice to a mortgagee of a tax sale are nonexistent. Indeed, the interests of the State to collect delinquent taxes are better served by mailing notice to mortgagees. St. Joseph County v. Wilmes, supra.

The fiscal and administrative impact on the State to send substitute notice by mail is slight. Notice by mail would be a less expensive, faster, and better procedure, one more reasonably calculated to apprise a mortgagee of a tax sale than is the method of notice by posting and publication.

In this case the lack of notice in the Indiana Statutes resulted in the Mennonite Board of Missions being permanently deprived of their property interest without ever having received adequate notice prior to the State action and even more without any compensation. The sending of a letter to the Mennonite Board of Missions, informing them of the tax sale, could have avoided the unconstitutional taking of the Mennonite Board of Missions' property interest. Had the Mennonite Board of Missions received adequate notice they would have paid the delinquent taxes and retained their property interests. In fact, shortly after first learning of the tax sale, the Mennonite Board of Missions tendered the statutory amount to pay the tax delinquency and redeem their mortgage. The State would thus have avoided the administrative time and expense of a tax sale.

In weighing the private interest at stake with the recognized State power to collect delinquent taxes, the procedures chosen by Indiana cannot be justified in view of the significant risk that an erroneous permanent deprivation of property may result when substitute notice by mail would appreciably eliminate this loss with little or no fiscal or administrative burden on the State. In fact, the State's interest would be better served by mailing notice. Mailed notice to mortgagees could result in avoiding an erroneous sale. It could also result in the State being paid sooner, and would in many cases result in the State saving administrative time and expenses by avoiding a tax sale.

IT IS A VIOLATION OF EQUAL PROTECTION TO GIVE ADEQUATE NOTICE ONLY TO ONE CLASS OF INTERESTED PARTIES

In the Due Process arguments it was demonstrated that notice of a tax sale to

mortgagees only by posting and publication was a violation of Due Process. It would also be a violation of Due Process if Indiana had chosen to give notice to owners only by posting and publication. Dow v. State, 396 Mich. 192, 240 N.W.2d 450 (1976) (Owner of significant interest in property must be given notice by mail of a tax sale. Notice by publication is insufficient). Accord, Township of Montville v. Block 69, Lot 10, 74 N.J.1, 376, A.2d 909 (1977). Indiana recognized as much, and thus provided for notice to owners by mail. But in providing adequate notice to owners, Indiana did not cure the constitutional defect in the manner of the notice provided to mortgagees. Each is entitled to adequate notice of a tax sale.

Even from the standpoint of the State's interest involved, it makes no sense and does not further any interest of the State

of Indiana to provide for notice to mortgagees only by posting and publication. There is no rational basis or State interest in distinguishing between owners and mortgagees with respect to the type of notice given to either of a tax sale when inadequate notice to either is a violation of Due Process. Cf. Zobel v. Williams, __U.S.__, 102 S.Ct. 2309 (1982). The distinction between the manner of service between the two supports no significant State interest. The Indiana Legislature has apparently recognized this when they amended the tax sale statutes in 1980 to provide for mailing notice to mortgagees.

County Auditor's in Indiana have not uniformly applied the Indiana tax sale statutes. In neighboring St. Joseph County, the County Auditor mails notices to mortgagees, probably because the St. Joseph County Auditor recognized the fundamental unfairness of only providing

constructive notice, and how simple a matter it was to mail notice to mortgagees of record. St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981). However, because Indiana officials do not treat all mortgagees equally, the Indiana tax sale statutes, as applied to the Mennonite Board of Missions are unconstitutional. Cf. Yick Wo v. Hopkin, 118 U.S. 356 (1885)

ARGUMENTS

THE INDIANA PROCEDURE VIOLATES DUE PROCESS BECAUSE THE MENNONITE BOARD OF MISSIONS WAS NOT GIVEN ADEQUATE NOTICE BEFORE BEING PERMANENTLY DEPRIVED OF THEIR PROPERTY BY STATE ACTION

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court reaffirmed some general principles of due process which stand out in the books. One "...[f]undamental requisite of due process of law is the opportunity to be heard." Id. p. 314; Grannis v. Ordean, 234 U.S.

385, 394. Another cardinal rule of Due Process noted by this Court in Mullane is that

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. p. 314.

Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385, 394.

In this case the Mennonite Board of Missions was denied Due Process because they were never given adequate notice of the tax sale. As a result, the Mennonite Board of Missions never knew that the Stevens property was sold by the Elkhart County Auditor to Adams until after the statutory redemption period expired. By that time, Adams had already been granted a tax deed by the Elkhart County Auditor, and pursuant to Indiana law Adams now owned the Stevens property in fee simple,

free and clear of the Mennonite Board of Missions' prior recorded mortgage.

This Court has emphasized on many occasions that the fundamental right to notice and an opportunity to be heard must be granted at "a meaningful time and in a meaningful manner" Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." (emphasis added) Ibid, 80.

Because they never received notice, the Mennonite Board of Missions never had an opportunity to be heard before the sale. Meanwhile, despite the sale, Moore

continued to pay the Mennonite Board of Missions the amount due under the mortgage each month. Thus, having received no actual notice of the tax sale, and with Moore continuing to pay her mortgage, the Mennonite Board of Missions had no reason to suspect that the Stevens property had just been sold by the State for delinquent taxes.

After a tax sale, the Mennonite Board of Missions, had the statutory right to redeem their property interest by paying the amount of the delinquent tax, together with interest, but Indiana law did not contain any requirement to notify the Mennonite Board of Missions of the tax sale and their subsequent right to redeem.

Since no notice was sent to the Mennonite Board of Missions following the tax sale and prior to the expiration of the

redemption period, the effect of the Indiana statutes is that the Mennonite Board of Missions had no actual knowledge of the tax sale until it was too late to redeem their property interest. After the redemption period expired, Indiana law vested Adams with a fee simple title to the Stevens property, free and clear of prior recorded liens. Consequently, the Mennonite Board of Missions never even had an opportunity under Indiana law to be heard before the state permanently deprived them of their significant property interest. Had the Mennonite Board of Missions received adequate notice, such as a simple letter or even a phone call, they would have paid the taxes as demonstrated by the fact that after actually learning of the tax sale, they promptly paid the statutory amount necessary to redeem the Stevens property.

Indiana law as applied to the Mennonite Board of Missions amounts to the State taking property without adequate notice and with no compensation. It is fundamentally unfair and a clear violation of the Constitution for the Mennonite Board of Missions to be deprived of property in such a manner. Cf. Lorretto v. Teleprompter Manhattan CATV Corp., __U.S.__, 102 S.Ct. 3164 (1982); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

IN BALANCING THE INTERESTS OF THE STATE WITH THE INTERESTS OF THE MENNONITE BOARD OF MISSIONS, THE PROCEDURES CHOSEN BY INDIANA TO SELL PROPERTY FOR DELINQUENT TAXES CANNOT BE UPHELD

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court reviewing prior decisions formulated the test to be applied to determine whether certain procedures measure up to Due Process.

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Ibid p. 335.

Using the Mathews approach, it is readily apparent that the Indiana tax sales statutes in effect at the time this case arose fail to withstand constitutional scrutiny.

THE PRIVATE INTEREST AFFECTED BY STATE ACTION IS THE PERMANENT LOSS OF PROPERTY

The nature of the private interest at stake is the Mennonite Board of Mission's permanent loss of their mortgage. A mortgagee is assuredly an interested party if the real property upon which he has a

mortgage is scheduled to be sold by the state because of delinquent property taxes. A mortgagee certainly has a significant property interest which could be affected by a tax sale. Although the precise nature of the mortgagee's interest depends upon state law, which may vary from state to state, under Indiana law a mortgagee's interest is subject to constitutional protection. Once a mortgagee's interest is recorded,[15] subsequent purchasers are charged with notice of the lien. In order to discharge the recorded mortgage from his title, a subsequent purchaser must deal directly with the mortgagee of record. A prospective buyer cannot discharge a mortgage by simply buying the property from the mortgagor. Unless paid, the mortgage remains a lien attached to the property.

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[15] Ind. Code §32-1-2-16

Indiana recognized that a mortgage is a valuable interest in real property, and accordingly granted a mortgagee the statutory right[16] to redeem his interest by paying the tax delinquency.

THE STATE INTEREST IN SELLING PROPERTY FOR DELINQUENT TAXES IS SOLELY TO COLLECT THE DELINQUENT TAX

The State of Indiana has an important interest at stake in selling real property for delinquent taxes. In Indiana, as in most other states, one prime source of revenue to keep state and county governments operating is property taxes.[17] If persons fail to pay their property taxes, the effect on government could be calamitous. Revenues would be reduced, and

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[16]Ind. Code §6-1.1-25-1

[17]Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings 84 Yale Law Journal 1505 (reviews state law in all 50 states and District of Columbia relative to tax sales)

vital government services could be impaired. Accordingly, Indiana promulgated the Indiana tax sale statutes to provide a means to collect delinquent property taxes.[18] A state however may not choose any method to collect delinquent property taxes. The statutes adopted must be within the bounds of Due Process under the Fourteenth Amendment to the United States Constitution.

A state's power to collect taxes is not unbridled. In Marchetti v. United States, 390 U.S. 39, this Court recognized the power of government to tax, but also noted that the Constitution places limitations in connection with the exercise of those powers. Id. 58. Indeed, it is this concern about abuses of tax power which led to the adoption of the Due Process

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[18]The Court of Appeals in this case referred to the collection of delinquent taxes as the obvious purpose of the statute (Jur. St. App. 26).

Clause contained in the Fifth and Fourteenth Amendment. Compare: Fuentes v. Shevin, 407 U.S. 67 (1972); Frank v. Maryland, 359 U.S. 360, 378 and G.M. Leasing Corp. v. U.S., 429 U.S. 338.

THE PROCEDURES CHOSEN BY INDIANA TO NOTIFY MORTGAGEES OF A TAX SALE CREATE A SUBSTANTIAL RISK OF AN ERRONEOUS DEPRIVATION OF PROPERTY WHILE SUBSTITUTE SERVICE BY MAIL WOULD REDUCE THE LIKELIHOOD OF ERROR

Indiana's choice to send constructive notice to mortgagees by posting and publication was not reasonably calculated to inform the Mennonite Board of Missions of a tax sale under the circumstances. Because of this manner of service the Mennonite Board of Missions never received actual notice of the sale to Adams in this case. And this problem is likely to recur. In other states where only constructive notice was given to interested parties, the result was the same; the

interested parties did not receive actual notice of the tax sale.[19]

IT WOULD NOT HAVE BEEN DIFFICULT FOR THE ELKHART COUNTY AUDITOR TO HAVE ASCERTAINED THE NAME AND ADDRESS OF THE MENNONITE BOARD OF MISSIONS

In this case the Elkhart County Auditor sent notice to Moore by certified mail regarding the tax delinquency, although Moore never picked up the notice. The process for mailing notice to the Mennonite Board of Missions would be the same as it was for Moore. The Mennonite Board of Missions' mortgage was a matter of public record. Under Indiana law,

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[19] Laz v. Southwestern Land Company (1964), 97 Ariz. 69, 397 P. 2d 52; Quay Development, Inc. v. Elegante Building Corporation (1981), Fla., 392 S. 2d 901; Chapin v. Aylward (1970), 204 Kan. 448, 464 P. 2d 177; Dow v. State (1976), 396 Mich., 192, 240 N.W. 2d 450; Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens (1979), Mo., 585 S.W. 2d 486; Township of Montville v. Block 69, Lot 10 (1977), 74 N.J. 1, 376 A. 2d 909.

before a deed or mortgage can be recorded, and be made a matter of public record, it must be first submitted to the county auditor so that it can be duly entered of record for taxation.[20] It would not have been difficult for the Elkhart County Auditor to have checked the Elkhart County public records to ascertain that the Mennonite Board of Missions had a mortgage on the Stevens property. It would have then been a relatively simple matter to mail notice to the Mennonite Board of Missions concerning Moore's tax delinquency. The fact that the Mennonite Board of Missions is a charitable, religious organization, affiliated with the Mennonite Church with offices located in Elkhart, Indiana is well known in Elkhart County.

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[20] Ind. Code §17-3-39-8 (recodified as Ind. Code §§36-2-9-18 and 36-2-11-14, effective September 1, 1981). Note also Ind. Code §32-8-20-1 requires the name and address of the mortgagee be on the recorded mortgage.

Indeed, the fact that Adams had checked the public records of Elkhart County and then directed the Elkhart County Sheriff to give the Mennonite Board of Missions notice of this lawsuit further reveals that the Elkhart County Auditor could also have simply checked the public records and then mailed notice to the Mennonite Board of Missions about the tax sale. Surely, the Elkhart County Auditor could also have checked the public records and mailed a letter to the Mennonite Board of Missions too.

NOTICE BY MAIL TO MORTGAGEES OF RECORD IS AN INEXPENSIVE PROCEDURAL SAFEGUARD WHICH WOULD SUBSTANTIALLY REDUCE THE LIKELIHOOD OF AN ERRONEOUS SALE OF PROPERTY

Notice reasonably calculated to apprise mortgagees would more likely than not reduce the prospects that the State might mistakenly sell property for delinquent taxes. The interests of mortgagees

and the State are identical with respect to the payment of property taxes. Each has a keen concern that the mortgagor not allow the taxes to become delinquent. In all actuality, the interests of the State are better served in mailing notice to a mortgagee in regard to a tax delinquency and possible sale. If a mortgagee received adequate notice he would undoubtedly, at no expense to the State, contact the mortgagor and investigate, on behalf of the State why there is a tax delinquency, if any. In the event a delinquency does exists, in all probability, the mortgagee would pay it immediately. This would result in substantial savings to the State in avoiding additional time and expenses which are incidental to any tax sale.

AN INDIANA CASE DEMONSTRATES THAT MAILING NOTICES TO MORTGAGEES CAN PREVENT AN ERRONEOUS DEPRIVATION OF PROPERTY

In the next county from the Mennonite Board of Missions' Elkhart, Indiana office, the St. Joseph County Auditor mails notices to mortgagees. Mailing notice to a mortgagee after a tax sale in one recent case, prevented an erroneous deprivation of property. In St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981), the St. Joseph County Auditor mistakenly sold some property at a tax sale. Although the taxes had been paid, the payment was not entered on a computer. After the tax sale the auditor mailed notice to the mortgagee. Upon learning of the sale, the mortgagee promptly paid the purported delinquent taxes, and investigated the problem, following which the error was discovered. The auditor then

refunded the mortgagee's second tax payment.

Similarly, had the Elkhart County Auditor mailed notice to the Mennonite Board of Missions, they would have paid the taxes, and the tax sale could have been avoided.

THE INDIANA COURT OF APPEALS ERRED IN NOT FOLLOWING MULLANE AND OTHER PRECEDENT OF THIS COURT

The Indiana Court of Appeals failed to follow this Court's decision in Mullane. Instead, the Indiana Court of Appeals followed existing Indiana precedent in First Federal Savings & Loan of Central Indiana v. Furnish, Ind. App., 367 N.E.2d 596 (1977). In Furnish, the Indiana Court of Appeals had erroneously concluded that a mortgagee of record was not entitled to the protections afforded by Due Process because only "owners" of the legal title

are covered, and thus, determined that Mullane would not apply.

This Court has not limited Due Process to just "owners" of a legal title, but has applied Due Process protection to persons having any significant property interest which may be affected by state action.

In Fuentes v. Shevin, 407 U.S. 67 (1972), this Court reviewed statutes from Florida and Pennsylvania which had authorized the summary seizure of goods or chattels. The statutes in each of those states provided for an ex parte application by a person claiming an interest in the property. If a person claiming an ownership interest in personal property posted a bond, the Court would issue a writ of replevin for the disputed chattels. In each case, a three judge federal district panel held that the seized goods --a stove, a stereo, a table, and the like--were not subject to Due Process

protection, since they were not absolute necessities of life. Rejecting that view, this Court reversed noting that Due Process embraces a larger class than simply "owners."

> "Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.
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> "The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest.'" Id. p. 86.

In Fuentes this Court concluded that Due Process required notice and an opportunity to be heard before the State may take personal property from its possessor. In this case, a mortgage is entitled to at least as much protection as a stove,

stereo, or table. And here, the deprivation is permanent, unlike, in Fuentes where the deprivation in theory, at least, may have been only temporary. Accordingly, based on Fuentes, this Court should find the Indiana tax sale statutes unconstitutional.

The Indiana Court of Appeals erroneously held that Indiana law did not violate Due Process although no provision exists to give notice to mortgagees following a tax sale. In support of that rule of law, the Court of Appeals relied upon Short v. Texaco, Ind. 406 N.E.2d 625 (1980), affirmed Texaco v. Short, 454 U.S. __, 102 S.Ct. 781 (1982).

Texaco is not applicable to this case. In Texaco, the failure to use a mineral interest for twenty years resulted in its reversion to the surface owner. This Court noted that the Indiana act in question did not require the State to take any

affirmative action.

> "It is the owner's failure to make any use of the property--and not the action of the State--that causes the lapse of the property right." Id. 102 S.Ct. 792.

In this case, the Indiana tax sale statutes required a series of affirmative acts by the Elkhart County Auditor to trigger them, and most importantly, the Mennonite Board of Missions did not abandon their property interest, but were enjoying the use and benefit of it, until the state acted without notice to take it away. Unlike in Texaco, an interested party cannot be presumed to know that his property is being sold by the State unless he receives notice reasonably calculated to apprise him of that fact.

In Mullane, this Court invalidated a New York statute which authorized notice by publication to beneficiaries of a common trust informing them about an annual judicial settlement of the common trust

account. This Court held that with respect to known beneficiaries Due Process required notice by mail, which this Court concluded was more reasonably calculated to give actual notice than notice by publication. This Court in Mullane stated the general rule that:

> "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." Ibid 318.

When, as here, the name and address of the Mennonite Board of Missions could have been easily obtained by the Elkhart County Auditor, the reasons disappear for means less likely than the mail to notify the Mennonite Board of Missions of a tax sale.

Based upon this Court's reasoning in Mullane, the Indiana Court of Appeal's decision in this case must be reversed.

The magnitude of the constitutional infirmity in this case is greater than in Mullane. In this case, lack of notice results in the Mennonite Board of Missions being permanently deprived of the property interest while in Mullane the question concerned only a review of how the trustee managed the common trust fund assets--not necessarily the permanent loss of the principal.

This Court has subsequently applied the Mullane guidelines to strike down various statutes which only provide for constructive notice to interested parties. In Walker v. City of Hutchinson, 352 U.S. 112 (1956), this Court held that newspaper publication of a condemnation proceeding did not measure up to the notice requirements of Due Process where the name and address of the owner whose property was affected by the proceeding was known to the city. In Walker, the only form of

notice to the property owner was by publication in a newspaper. Addressing the issue of the validity of notice by publication, Justice Black wrote that:

> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value." Ibid p. 116.

What happened in the Mennonite Board of Missions case offends the fundamental concepts of Due Process even more so than in the Walker case, because in Walker, although the government took a property interest, it did pay compensation for it,

while here, the Mennonite Board of Missions property interest was taken by the government without any compensation at all.

In another case, similar to this appeal, this Court struck down a New York procedure which provided for giving notice to a riparian land owner only by publication and posting. Schroeder v. City of New York, 371 U.S. 208 (1962). Finding that Mullane controlled the disposition of that case, this Court lambasted the use of constructive notice to interested parties when their names and address are known. In the latter event, the state must as a matter of Due Process send notice by mail.

In New York v. New York, N.H. and H.R. Company, 304 U.S. 293 (1953), this Court reiterated the general rule that notice by publication is a poor and sometimes hopeless substitute for actual service of

notice, and that its justification is difficult at best. Based upon the same reasoning and analysis, in the above cited cases, this Court should find the Indiana tax sale statutes which only provides for notice to mortgagees by posting and publication unconstitutional.

In Covey v. Town of Somers, 351 U.S. 141, this Court struck down as a violation of Due Process under the Fourteenth Amendment the taking of property from a known incompetent by the State as a result of a tax sale, even though the New York statutory procedures for selling property because of delinquent taxes were followed.

It should be noted that Mennonites seldom become involved in litigation because of their religious beliefs. Thus, the likelihood of a Mennonite going to the courthouse to look at a public notice is not great. And as this Court has previously noted in Mullane:

> "Chance alone brings to the attention of...a...resident [a legal] advertisement in small type inserted in the back pages of a newspaper." Id 315.

It is submitted that the prospects of a Mennonite reading a legal notice is slim at best. Elkhart County has a higher ratio of Mennonite citizens than nearly any other place in the United States. It is further submitted that Elkhart County officials should thus know that the Mennonite Board of Missions, an affiliate of the Mennonite Church, would not be in the habit of reading legal notices posted at the courthouse or in newspapers. Yet, the Elkhart County Auditor's only notice to the Mennonite Board of Missions was by posting at the courthouse and publishing a legal notice in a newspaper. Under these circumstances, the sale of the Mennonite Board of Missions' property interests constitutes a violation of Due Process. Covey v. Town of Somers, 351 U.S. 141.

In a similar fashion, this Court applying the Mullane guidelines invalidated a State sale of an automobile because the State knew that the owner was in jail at the time of the forfeiture sale but instead sent him notice at his home mailing address. Robinson v. Hannahan, 409 U.S. 38 (1972).

This Court, just this last Term, in Greene v. Lindsey, __U.S.__, 102 S.Ct. 1874 (1982), reaffirmed those well entrenched Due Process principles articulated in Mullane. In Greene, this Court struck down the Kentucky Forcible Entry and Detainer Act holding that the posting of service of process by tacking it upon the door of a tenant's apartment was, under the circumstances, not reasonably calculated to apprise a tenant of an eviction action and hence was violative of Due Process. This Court citing Mullane suggested that service on a tenant by mail

was an inexpensive additional manner of service which would more likely result in the tenant receiving actual notice of the eviction proceedings.

The defective notice in the Indiana tax sale statutes is even more egregious than the deficiency this Court found in Greene. The Kentucky procedures in Greene initially provided for personal service on a tenant by directing the sheriff to give a tenant personal notice of an eviction action. The Kentucky procedure then provided for posting notice on a tenant's apartment door if he was not home. These notice provisions are more reasonably calculated to apprise a tenant of an eviction action than are the procedures chosen by Indiana to inform a mortgagee of a tax sale. To begin, there is no requirement under Indiana law to initially give personal notice to a mortgagee of a tax sale

by the sheriff unlike the Kentucky procedure in Greene. Secondly, posting on a tenant's door under the Kentucky procedure is more apt to come to the attention of an interested person than is the procedure utilized by Indiana where posting does not take place at the affected property but at the Courthouse. This decreases the likelihood of an interested person receiving actual notice of a tax sale. Thus, based upon this Court's holding in Greene, this Court should find the Indiana tax sale statutes unconstitutional because they fail to provide adequate notice to inform mortgagees of a tax sale or of their redemption rights.

THE PREVAILING VIEW IN OTHER STATES WHICH HAVE RULED ON THE SAME OR SIMILAR ISSUE RAISED HERE HAVE FOLLOWED MULLANE AND HELD THAT NOTICE BY PUBLICATION VIOLATES DUE PROCESS

Several state courts of last resort have already ruled upon the same or similar question(s) raised in this case. The prevailing weight of authority have followed the controlling precedent set by this Court in Mullane, and have held that constructive notice of a tax sale to interested parties violates Due Process. Those decisions concluded that the minimum requirement under Due Process is notice by mail.

In Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 53 (1964), the owners had failed to pay a special assessment, and as a consequence, their property was sold at a regular assessment sale and a deed was given to the Southwestern Land Co. by the Superintendent of Streets of

the City of Tucson, Arizona. After the period to redeem the property expired, the Land Company brought a quiet title action against the owners of the legal title and Rose Laz, the mortgagee. The trial court granted a summary judgment in favor of the Land Co. The Arizona Supreme Court, citing Mullane and Schroeder, held that where the only notice to a mortgagee of record prior to a tax sale was by publication, the sale violated Due Process.

The Michigan Supreme Court in Dow v. State, 396 Mich. 192, 240 N.W.2d 450 (1976), citing Mullane and thoroughly canvassing other decisions of this Court held

> "that the Due Process Clause requires that an owner of a significant interest in property be given proper notice and an opportunity for a hearing at which he or she may contest the state's claim that it may take the property for nonpayment of taxes and that newspaper publication is not constitutionally adequate notice of such right." Id., 240 N.W.2d 450, 452.

The New Jersey Supreme Court in an exhaustive analysis of the decisons of this Court in Mullane and cases which followed concluded that:

> "under...federal constitutional guarantees, that where an owner's name and address appear..., notice must be sent by mail before a taxpayer's right to redeem his property may be foreclosed."

Township of Montville v. Block 69, Lot 10, 74 N.J.1, 376 A.2d, 909, 918 (1977)

Decisions in Florida, Kansas, and Missouri all followed Mullane, and have held that notice by publication is insufficient as a matter of Due Process in a tax sale.[21]

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[21] Quay Development, Inc. v. Elegante Building Corporation (1981), Fla., 392 S. 2d 901; Chapin v. Aylward (1970), 204 Kan. 448, 464 P. 2d 177; Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens (1979), Mo., 585 S.W. 2d 486

THE INDIANA TAX SALE PROCEDURES VIOLATE EQUAL PROTECTION

From the previous analysis, it is apparent that all persons with a significant interest in real property are entitled to notice by mail of a tax sale as a matter of Due Process. In this case, Due Process and Equal Protection overlap with respect to what procedures Indiana may constitutionally use in selling real property for delinquent taxes. It has been demonstrated from the previous discussion that the State of Indiana has no significant interest to be served by not mailing notice to mortgagees of record. Instead, the interests of the state are actually better served by mailing notice to mortgagees of record. Since the only purpose of the state in a tax sale is to collect delinquent taxes, no justification exists with respect to the discrimination in

notifying owners and mortgagees of a tax sale when the State's interest is enhanced by mailing notice to mortgagees as well as owners. And, where the failure to receive adequate notice is a violation of Due Process, no significant state interest can be advanced to support the difference in notice between the two. Cf. Zobel v. Williams, __U.S.__, 102 S.Ct. 2309 (1982).

This Court stated in Fuentes v. Shevin, 407 U.S. 67 (1972), that Due Process applies to more than "owners" of the affected property. In this case Due Process applies to mortgagees of record too. Therefore, it is a denial of Equal Protection not to send notice to mortgagees by mail. The discrimination in the manner of notice between owners and mortgagees has no rational basis, and furthers no compelling State interest. The Indiana legislature recognized this fact and as a consequence amended the tax sale statutes

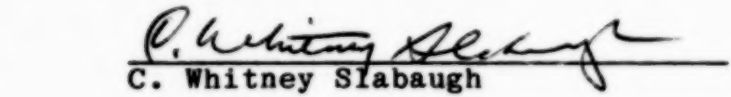
in 1980 after the decision in Furnish to provide for additional notice to mortgagees by mail.

County Auditor's in Indiana have not uniformly applied the Indiana tax sale statutes. In neighboring St. Joseph County, the County Auditor mails notices to mortgagees, probably because the St. Joseph County Auditor recognized the fundamental unfairness of only providing constructive notice, and how simple a matter it was to mail notice to mortgagees of record. St. Joseph County v. Wilmes, Ind. App., 428 N.E.2d 103 (1981). However, because Indiana officials do not treat all mortgagees equally, the Indiana tax sale statutes, as applied to the Mennonite Board of Missions are unconstitutional. Cf. Yick Wo v. Hopkin, 118 U.S. 356 (1885)

CONCLUSION

From the foregoing analysis, it is readily apparent that the Indiana tax sale statutes violate Due Process and Equal Protection. Thus this Court should reverse the decision of the Indiana Court of Appeals. This Court should further invalidate the tax sale to Adams with respect to the interests of the Mennonite Board of Missions and remand this case for further proceedings, not inconsistent with this decision.

Respectfully submitted,



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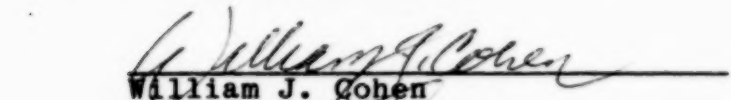

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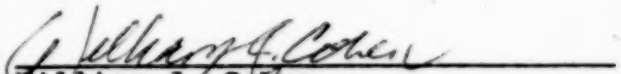
CERTIFICATE OF FILING AND SERVICE OF THE BRIEF OF APPELLANTS AND JOINT APPENDIX

I, WILLIAM J. COHEN, counsel for the Appellants, the Mennonite Board of Missions, and a member of the of the Bar of the United States Supreme Court, hereby certify:

1. That on the 23 day of December, 1982, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to the Clerk of this Court, forty (40) copies of Appellant's Brief on the merits and Joint Appendix which is due on or before December 27, 1982.

2. That, in addition, I hand delivered to Robert W. Miller, counsel for the Appellee, at his address, 112 N. Second St., Elkhart, Indiana 46516, three (3) copies of Appellant's Brief on the merits and Joint Appendix.

3. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to Linley E. Pearson, Attorney General for the State of Indiana, at his address, 219 State House, Indianapolis, Indiana 46204, three (3) copies of Appellant's Brief on the merits and Joint Appendix.



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No. 82-11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MENNONITE BOARD OF MISSIONS,
Appellant,

v.

RICHARD C. ADAMS,
Appellee.

APPEAL FROM THE
INDIANA COURT OF APPEALS

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QUESTIONS PRESENTED

I. Does a statutory scheme that requires notice by publication to a mortgagee before a tax sale violate the due process clause of the fourteenth amendment?

II. Does a statutory scheme that does not require notice to a mortgagee before the end of a mortgage redemption period constitute taking without just compensation?

III. May a state constitutionally distinguish between notice given to an owner and notice given to a mortgagee in a tax sale statutory scheme without violating the equal protection clause of the fourteenth amendment?

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No. 82-11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MENNONITE BOARD OF MISSIONS,
Appellant,

v.

RICHARD C. ADAMS,
Appellee.

Appeal from the
Indiana Court of Appeals

STATEMENT OF THE CASE

This case arose because of the actions of three separate parties. As the Appellant Mennonite Board of Missions (hereinafter "the Board" or "the Mortgagee") noted in its Statement of the Case (see Brief of Appellant at 4-12), the Board was a mortgagee of property in Elkhart, Indiana. (J.A. 45-47) The Appellee, Richard C. Adams

(hereinafter "Adams"), purchased the property at a tax sale (J.A. 3-4, 13) after the mortgagor, Alfred Jean M. Moore (hereinafter "Moore") failed to pay property taxes (J.A. 17) even though she was obligated to do so by virtue of the mortgage. (J.A. 45-47) After the expiration of the statutory two-year redemption period, the Board discovered that Moore had not paid taxes either prior to the sale or during the redemption period. (J.A. 17)

Adams filed an action to quiet title to the real estate soon after the expiration of the redemption period, naming both the Board and Moore as defendants. (J.A. 3-6) Moore did not appear and a default decree was entered against her (J.A. 14-15); she is not a party to this appeal. Adams and the Board both filed motions for summary judgment (J.A. 15-16; 18-19) and the trial court, finding no

dispute as to material facts, granted Adams's motion. (J.A. 36-37) This decision was upheld by the Court of Appeals of Indiana in an unpublished decision (Jurisdictional Statement at 17-28) and, after the Supreme Court of Indiana denied transfer, appeal was filed in this Court. (Jurisdictional Statement at 44-45)

SUMMARY OF ARGUMENT

The Board has attacked the decision below on several grounds, most notably on the ground that the notice given to it was insufficient in the present case. The Board relies on several decisions from this Court, but an analysis of these decisions reveals that none of them is pertinent. Moore and the Board had analogous interests in the property and notice to Moore would tend to protect the interests of the Board. The protection of recognized interests is the purpose of notice requirements.

Ample reasons exist to support the Legislature's determination that mortgagees do not need as sufficient a notice as do landowners. Mortgagees are better able to protect themselves than are landowners. They have several alternative methods available to them by which they may protect themselves. The Board drafted the mortgage, which did not take advantage of these

available protections. The Legislature could have concluded that more certain notice would have been administratively and commercially unfeasible. Finally, the property interests of landowners and mortgagees, although similar, are different: the landowner's sole interest is in the property itself but the mortgagee has an interest in the lien upon the property. Removal of the property takes all the landowner has; it does not destroy the underlying obligation upon which the mortgagee may recover.

The Board also argues that it should have received notice before the expiration of the statutory redemption period. Just last term, however, this Court recognized that all persons are presumed to know the law and that the state may condition the retention of a property interest upon the performance of a task within a limited time period. The State, in the present

case, is requiring nothing more of the Board.

Finally, the Board raises an equal protection challenge to the distinctions made between landowners and mortgagees. These distinctions are based on rational reasons, however, and the Legislature properly could have made the distinctions because of such rational reasons.

ARGUMENT

I. NOTICE BY PUBLICATION AND POSTING ADEQUATELY SAFEGUARDS A MORTGAGEE'S INTEREST IN PROPERTY.

A. Such Notice Is "Appropriate To The Nature Of The Case."

Both in the courts below and in this appeal the Board has based its primary reliance on this Court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In that decision Justice Jackson, writing for the Court, first used the often quoted statement:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313. Adams concedes that the Board

had a property interest at stake, the property interest being in the lien it had by virtue of the mortgage as a security for Moore's debt. The Board did not have title to the land. Indiana Department of Revenue v. Colpaert Realty Corp., 231 Ind. 463, 109 N.E.2d 415 (1952). This Court has never required that non-owners of land receive more than published notice where action is taken against the land. As noted in Mullane, the reason for this is that "an owner of tangible property . . . usually arranges means to learn of any direct attack upon his possessory or proprietary rights." 339 U.S. at 316. The court below correctly refused to expand the established rule to require more certain notice to the mortgagee. The court below held, in effect, that the Legislature's notice scheme adequately met the Mullane standard that "notice must be of such nature as reasonably to convey the required

information . . . ." Id. at 314. Ample reasons exist for affirming this finding.

The Board obviously carries a heavy burden because of the strong presumption of constitutionality that a statutory scheme carries with it. St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981); United States v. Vuitch, 402 U.S. 62 (1971). As will be shown, the Indiana State Legislature had sufficient reasons for the notice scheme that it established. In addition, the Board had available to it several methods it could have employed to protect itself from the loss of the property interest it held in the mortgage. These factors and others lead to the conclusion that the decision below should be affirmed.

B. Precedent From This Court Does Not Resolve The Issue Presented On Appeal.

Mullane v. Central Hanover Bank & Trust Co., supra, involved the question of whether published notice was sufficient to make beneficiaries of a common trust fund aware that the fund's trustee had sought a judicial settlement of accounts. This Court held that something more than published notice was necessary. In doing so, this Court established a balancing test that weighed the interest of the state in effecting final settlement of the trust fund, 339 U.S. at 313, against the individual's interest in receiving notice of such a settlement. Id. at 314. Such a necessary balance continually has been recognized by this Court and others as a necessary element of due process. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367

U.S. 886, 894-95 (1961); Smith v. Dallas County Board of Education, 480 F. Supp. 1324, 1338 (S.D. Ala. 1979); Pharmaceutical Manufacturers Association v. Weinberger, 411 F. Supp. 576, 578 (D.D.C. 1976). Indeed, such a balancing is necessary to any due process analysis. As Justice Stewart noted in his majority opinion in Cafeteria & Restaurant Workers Union, supra, 367 U.S. at 895, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

One key factor in the Mullane decision was the lack of representation by one set of contestants in the absence of certain notice to the beneficiaries of the common trust fund. "[T]hese beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary."

339 U.S. at 316 (emphasis added). Such is not true in the present case. Moore and the Board had similar interests at stake—Moore's in the property itself and the Board's in its lien upon the property—and notice to one of these parties should have served to protect both parties' interests. The Board concedes that notice was mailed to Moore both before the tax sale and before the expiration of the redemption period. Brief of Appellant at 7 n.8. For whatever reason, Moore chose not to respond. Still, those parties who had interests in the property or the lien prior to the tax sale were given a more certain notice than was given in Mullane prior to that tax sale.

Moore had an interest in the property of at least $6,000 (although the record does not indicate the exact value of the property, Moore took a $14,000 mortgage (J.A. 45) and had an $8,000 balance due

(J.A. 16).) Certainly the typical property owner with that type of stake in property would normally respond when notified of the potential loss of his property. That being true, this Court should uphold the adequacy of the notice given to those with a pre-tax sale interest in the property and the lien. This Court has noted that due process requirements are shaped by the typical cases, not—as were Moore's actions in the present case—the rare exceptions. Califano v. Yamasaki, 442 U.S. 682, 696 (1979).

The same factors weigh against the Board's reliance on Schroeder v. City of New York, 371 U.S. 208 (1962), and Walker v. City of Hutchinson, 352 U.S. 112 (1956). These factually similar condemnation proceedings were appealed to this Court based on a lack of notice to individual landowners. In Walker, notice was by publication only; in Schroeder published notice was augmented

by notice posted not on the landowner's land but on land near the proposed diversion of a river. This Court acknowledged that no mechanical test exists for deciding whether notice is sufficient, Schroeder, supra, 371 U.S. at 212, but found in each case that notice by publication was insufficient to notify the respective landowners. Id. at 212-13; Walker, supra, 352 U.S. at 116.

Obviously, Schroeder and Walker both deal with the notice required to be given to owners of land, not to mere mortgagees. More importantly, the holdings of these two cases should not be extended to mortgagees. As noted above, the Board does not contest the sufficiency of notice given to Moore. Instead, it rests its appeal on the alleged insufficiency of notice that it received. But because the interest that Moore had in the property itself and that the Board had in its lien

so closely parallel one another, the State Legislature could and did reasonably conclude that mailed notice to one would suffice to protect the interests of both. This is the kind of balancing that Justice Powell, speaking for this Court, has recognized must be made in such situations, see Mathews, supra, 424 U.S. at 334-35, and, even if this Court disagrees with the wisdom of the Legislature's choice, it should not rule that the choice was unconstitutional just because of this disagreement, see Greene v. Lindsey, ___ U.S. ___, 102 S. Ct. 1874, 1883 (1982)(O'Connor, J., dissenting).

Finally, the Board places great reliance on Greene, supra. This reliance is questionable; the decision was not concerned with a fact situation similar to that presented by the present appeal and the decision must be read as a narrow one peculiar to its facts. In Greene

this Court held that mere posting on an apartment door in a forcible detainer action was not sufficient notice where the process servers who posted the notice knew that such notices often were removed before they were seen by the intended tenants. Yet a reading of this decision indicates that both the majority and the minority believed the outcome of the case to be governed by its peculiar facts. See 102 S. Ct. at 1879-80; id. at 1882-83 (O'Connor, J., dissenting).

Significantly, however, this Court's majority opinion in Greene helped further explain the balancing test that must be applied to a decision on whether notice is adequate:

> In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by

> the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925).

Id. at 1879. As will be shown below, "the affairs of men as they are ordinarily conducted" indicate that, in the present case, the Board received all of the notice it reasonably could have expected to receive. Thus, because the Board admits that the statutory scheme was followed carefully in this case, this Court should hold that the notice provisions of the scheme are not constitutionally infirm.

C. The Statutory Notice Provisions Chosen By The State Legislature Were Constitutional.

In his dissent in the seminal case of Fuentes v. Shevin, 407 U.S. 67 (1972), Justice White properly referred to the balance necessary in due process questions between the government function involved and the nature of the private interest affected. Id. at 101-02 (White, J., dissenting)(citing Cafeteria & Restaurant Workers Union, supra, 367 U.S. at 895). "In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved." 407 U.S. at 100 (White, J., dissenting). Many reasons exist to support the conclusion that the State Legislature properly considered the practical reasons involved when it did not require that mortgagees receive mailed notice prior to tax sales.

First, the vast majority of mortgagees are professional lending institutions that make substantial amounts of their income from their status as mortgagees. For example, recent data indicate that of the $1,314.7 billion in mortgage credits outstanding in this country in 1980, $1,114.1 billion, or 85%, were held by just five kinds of lenders: savings and loan associations, commercial banks, mutual savings banks, life insurance companies, and federal credit agencies. See Bureau of the Census, United States Department of Commerce, Statistical Abstract of the United States 1981 517 (102d ed. 1981). These institutions are the type that will take any of the numerous steps available to them to protect their interests. The Legislature properly could have concluded that they, as mortgagees, did not need the protection that landowners needed and, thus, could conclude that mailed notice was not

required for mortgagees. This Court has noted that the purpose of notice is to convey required information, Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 13 (1978); Mullane, supra, 339 U.S. at 314, and the Legislature could have concluded that other methods of conveying information were available to the mortgagees. Little is resolved by a plea by the Board in the present case that it is not a professional lending institution. First, the same alternative protections are available to it as are available to professional lending institutions. Second, concepts of due process are formed by looking toward the majority of cases, not the exception. Califano, supra, 442 U.S. at 696.

The court below recognized these factors and outlined several ways in which the Board could have protected itself.

Though [the Board] may not be a professional money lender, it freely chose to enter an area of sophisticated financial investment and thereby necessarily chose to incur the risk inherent therein. The State cannot reasonably be expected to assume the risk of its citizens' business ventures. [The Board] could have protected itself in one of at least three ways, in addition to the notice by the State. First a condition of the mortgage could have required a copy of the paid tax assessment be given to [the Board] within a given time after the taxes were due. Second, the mortgage could have provided that a portion of each payment be put in escrow and [the Board] then pay the tax assessment. Or third, [the Board] could have checked the public records to determine whether the tax assessment had been paid.

(Jurisdictional Statement at 27 n.9)

The Legislature could have determined that these or other actions by the Board adequately would have provided it notice of the delinquent tax payments. For example, the Board could have asked Moore whether she had paid the taxes. One court has noted that "it is incomprehensible that persons owning real estate are unaware of the fact that each year taxes become due and owing on all real estate . . . ." Catoor v. Blair, 358 F. Supp. 815, 816 (N.D. Ill.), aff'd without opinion, 414 U.S. 990 (1973). The same can be said of the Board in the present case, particularly because the mortgage that it prepared specifically required Moore to pay such taxes. (J.A. 46) As noted by the Board (Brief of Appellant at 7), Indiana statutes do not permit a list of property with delinquent taxes to be drafted until the taxes are delinquent for at least

fifteen months. More than two additional months lapse before a tax sale is held (id.), and the mortgagee has an additional two years after the tax sale to redeem its interest. (Id. at 8-9) This lengthy grace period without any action on the part of the Board supports the reasonableness of the Legislature's conclusion that those who enter into the mortgage business should be prepared to take reasonable steps to protect themselves. Prudent businessmen would do just that. See Greene, supra, 102 S. Ct. at 1879.

The Legislature also could have concluded that requiring mailed notice is both administratively and commercially unfeasible. As the dissent noted in Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909, 921-22 (1977)(Conford, P.J.A.D., dissenting), New Jersey's experience with mailed notice had faced precisely those obstacles. The plan was

administratively unfeasible because (1) the required notices and proofs of service could not be permanently maintained in tax assessors' offices and (2) those offices could not be adapted to offices of public record. These factors led title insurance companies to conclude that it would be commercially impractical to insure titles based on foreclosures under that system.

The Board argues in its brief that methods other than those chosen by the Legislature could better achieve the Legislature's goals. (Brief of Appellant at 25-29) The wisdom of the Legislature's choices is not before this Court; instead, this Court must base its decision on the constitutionality of the choices made. Greene, supra, 102 S. Ct. at 1883 (O'Connor, J., dissenting). In the same manner, the Legislature's amendment of notice requirements (see Brief of Appellant at 4 n.1), in no way invalidates the constitutionality

of the Legislature's prior choices.

The present appeal does not present a question like that presented in Schroeder, supra, Walker, supra, or Mullane, supra, where, in each instance, a finding in opposition to the respective appellants would have resulted in the appellants' losing the entire interests they held in their respective properties. Instead, the Board in the present case still can recover on the note underlying the mortgage it entered into. See G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law § 8.1 (1979). For all of these reasons, this Court should conclude that the judgment of the Legislature in establishing the statutory scheme followed in this case was proper and uphold the scheme against constitutional attack.

II. THE STATE IS NOT OBLIGATED TO GIVE NOTICE BEFORE THE END OF A STATUTORY REDEMPTION PERIOD.

The question of whether notice constitutionally must be given before the end of a statutory redemption period was addressed by this Court just last term in a case that also was appealed from the Indiana courts, Texaco, Inc. v. Short, ___ U.S. ___, 102 S. Ct. 781 (1982). That appeal involved several challenges to the Indiana mineral lapse statutes, which provide that a subsurface mineral interest separate from the surface interest would "lapse" if not used in one of several ways during a twenty-year period and would revert to the owner of the surface interest. This Court upheld the statutory scheme against several constitutional attacks. Among its holdings, this Court stated that the State was not required to give individual notice to all mineral rights owners of the passage of the new law.

Id. at 793. Key to this determination was a finding that a two-year grace period existed during which mineral rights owners could be expected to familiarize themselves with the law:

> The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the two-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms.

Id.

This Court recognized the "power of the State to condition the retention of a

property right upon the performance of an act within a limited period of time." Id. at 791. That is precisely what the State Legislature has required of the Board in the present case. It has given to the Board and to all others with an interest in property or in mortgages to property an opportunity to redeem that interest within a two-year period; otherwise, the interest will cease to exist. As Texaco teaches, the Board and others similarly situated are presumed to know the existence of this law. See id. at 793. Furthermore, the Board is expected to follow that law if it is to retain the property interest that it previously held. See id. at 791.

The Board attempts to distinguish Texaco by arguing that a series of affirmative acts by state officials triggered the Board's loss of a property interest. (Brief of Appellant at 31-32) Throughout the remainder of its brief, however, the Board argues that

just the opposite situation has caused it to lose a property interest: the Board elsewhere consistently criticizes the lack of affirmative actions by the State in failing to give positive notice both before the tax sale and before the expiration of the redemption period. Adams agrees with the Board to the extent that it is arguing that Texaco has no applicability to the question of required notice before the tax sale. To the extent that the question concerns whether personalized notice must be given before the end of the redemption period, however, Texaco precisely resolves that question in Adams's favor.

Adams has shown previously that the Board received all of the notice to which it was entitled before the tax sale was held. This being so, the Board's second question on appeal is whether it was entitled to notice after the tax sale but before the end of the redemption period. In its brief, the

Board never appears to address this question in a straightforward manner. Yet that is precisely the question resolved by Texaco. After this Court holds that the Board received adequate notice before the tax sale, Texaco then imputes to the Board knowledge of the redemption period, see id. at 793, and power to the state to condition retention of a property interest upon taking certain actions, see id. at 791, i.e., using the redemption period to its advantage.

Other courts have similarly rejected challenges to self-executing properties of statutes. The court in De Tenorio v. McGowan, 510 F.2d 92 (5th Cir.), cert. denied, 423 U.S. 877 (1975), held that due process was not denied because a treaty gave a foreign national only three years to sell property she had inherited within the United States. In Equity Mortgage Corp. v. Loftus, 504 F.2d 1071 (4th Cir. 1974), the court charged a senior lienor with knowledge of a statute

that permitted the United States to redeem realty upon which it had a tax lien by tender of a specified amount. The court in Buell v. Sears, Roebuck & Co., 321 F.2d 468 (10th Cir. 1963), held that one who dedicated land for a public street was charged with knowledge of a statute that vested the land in an adjoining landowner once the Government had vacated the land.

These decisions all support the conclusion reached by this Court in Texaco, supra. Due process is not violated either by charging the Board with knowledge of the statutory redemption period or requiring the Board to take affirmative steps during that redemption period in order to protect the property interest it has in the mortgage.

III. THE STATE CONSTITUTIONALLY MAY DISTINGUISH BETWEEN OWNERS AND MORTGAGEES FOR THE PURPOSE OF NOTICE REQUIREMENTS WITHOUT VIOLATING THE MORTGAGEES' GUARANTEES OF EQUAL PROTECTION.

The Board does not and cannot contend that this appeal involves either a suspect classification or a fundamental right. Thus, this Court has recognized that some inequality is permitted by the state in its treatment of different kinds of persons. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50-51 (1973). The state must choose the least restrictive path only where such a suspect classification or fundamental right is involved. Id. Rodriguez concerned an unsuccessful challenge to the state financing of local schools based partly on varying amounts from local property taxes.

In the field of taxation, this Court has recognized a particularly large leeway in classifications, Kahn v. Shevin, 416 U.S. 351, 355-56 (1974), and has stated that

courts should not substitute their judgments for those of legislatures. Id. at 356 n.10. Only where no rational reason exists for the legislatively drawn distinction should that distinction be overturned. Texaco, supra, 102 S. Ct. at 797. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise economic or social policy." Dandridge v. Williams, 397 U.S. 471, 486 (1970).

Adams previously has noted a myriad of reasons why the State Legislature might choose to distinguish between the notice that must be given owners and the notice that must be given mortgagees: mortgagees, as a class, are better able to protect themselves; mortgagees have the option of taking certain actions unavailable to owners that serve to protect them; mailed notice is economically and administratively unfeasible; because of the different ownership interests of

landowners and mortgagees, different notice requirements are appropriate. All of these rational reasons support the distinctions that the Legislature has drawn between landowners and mortgagees.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Indiana should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of January, 1983, I forwarded by first class mail, postage prepaid, three copies of the foregoing Brief of Appellee to each of the following:

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CASE NBR 82-1-00011 ASX

SHORT TITLE Mennonite Bd. of Missions DOCKETED: Jul 1 1982

VERSUS Adams, Richard C.

Date	Proceedings and Orders
Jul 1 1982	Statement as to jurisdiction filed.
Aug 4 1982	DISTRIBUTED. September 27, 1982
Aug 11 1982	Response requested.
Sep 8 1982	Motion of appellee respondent to dismiss or affirm filed.
Oct 12 1982	REDISTRIBUTED. October 15, 1982
Oct 12 1982	PROBABLE JURISDICTION NOTED.
	**********
Nov 3 1982	Order extending time to file joint appendix and appellant's brief on the merits until December 27, 1982.
Dec 27 1982	Brief of appellant Mennonite Bd. of Missions filed.
Dec 27 1982	Joint appendix filed.
Jan 18 1983	Brief of appellee Richard C. Adams filed.
Jan 25 1983	CIRCULATED.
Feb 2 1983	Record filed.
Feb 15 1983	SET FOR ARGUMENT. Wednesday, March 30, 1983. (4th case)

CONTINUE {

CASE NBR 82-1-00011 ASX

SHORT TITLE Mennonite Bd. of Missions DOCKETED: Jul 1 1982

VERSUS Adams, Richard C.

Date	Proceedings and Orders
Mar 30 1983	ARGUED.